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CASES

DECIDED IN THE

Supreme Court of Ohio

IN BANK

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AT DECEMBER TERMS, 1837, 1838

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

By CHARLES HAMMOND
ATTORNEY AT LAW

VOLUME VIII

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CINCINNATI
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CASES

DECIDED BY THE

Supreme Court of Ohio,

IN BANK,

AT DECEMBER TERM, 1837.

PRESENT:

EBENEZER LANE,
REUBEN WOOD,
PETER HITCHCOCK,
FREDERICK GRIMKE,
} JUDGES.

LESSEE OF SWAZEY'S HEIRS *v.* LEWIS V. BLACKMAN AND WIFE.

All last wills and testaments must be established by probate in the court of common pleas, and until a last will and testament is so established by probate, it can not be received as evidence of any title set up under it.

THIS case was adjourned from the county of Hamilton, upon a motion in behalf of the defendants for a new trial.

The lessors of the plaintiffs claim as heirs at law; the defendants as *devisees*. The question at issue arose upon the alleged will of Hazen Swazey. The paper was produced in court, at the trial of the ejectment, and parol evidence offered of its due execution.

It was part of the proof, that the alleged will had been twice offered for probate, in the court of common pleas of Hamilton county, and the probate refused. Open parol proof of the will was now objected to, in behalf of the heirs at law, and the objection sustained. There was of course, upon this decision, a verdict for the plaintiff. The defendants moved for a new trial, and the motion was adjourned here for decision.

STORER and SPENCER, in support of the motion:

The simple matter presented by the motion is, whether a will executed in Ohio, in 1830, devising lands here situated, not ad-
6] mitted *to probate, but, on the contrary, twice offered for that purpose and expressly *rejected*, can be proven *on the trial*, in an action of ejectment, by *parol* testimony, for the purpose of sustaining the devise.

By section 7 of the "act relating to wills," passed in 1824 (Chase's Stat. 1305), and in force at the time the present will was executed, it was provided, "that the executor of, or any other person interested in, any last will, etc., may cause it to be brought before the court of common pleas of the proper county, and cause the witness thereto to be examined, etc.; and if it shall appear that such will was duly executed, etc., the court shall cause the will, together with the proof, to be *recorded*. And every will which shall be proved in manner aforesaid, and shall have a certificate thereof indorsed upon it, with the seal of the said court thereunto annexed, and also a *transcript* of the record of such will, certified by the clerk under the seal of the court, shall be as effectual, in all cases, as the original will would be if produced and proven." And by section 17 of the same act, it is provided that "all *original wills* shall be recorded and filed in the clerk's office of the court in which they are respectively proven."

We contend, that by a fair construction of these provisions of the statute, taken in connection with all the previous laws on the same subject, the only legal evidence that can be received of the due execution of a will, whether of *real* or *personal* estate, on a trial in which any title is claimed under it, is a certificate of probate under the seal of the court of common pleas, or a transcript of the record of probate properly certified.

From the earliest organization of the territorial government to the present period, it has been the peculiar object of our system, that wills should be *proven* before the judges of the common pleas

sitting as a court of probate; and so important has the legislature deemed a probate before this tribunal, that by all the statutes on the subject, from the year 1808 to that of 1824, including three distinct enactments, have they expressly provided, "that before any written will or codicil can be considered *valid* in law, it shall be presented for probate, etc., and *proven*," etc. See Chase's Stat. 572, 680, 930. Previous to 1808, the language of all the statutes is "that all wills and codicils in writing, etc., being *proven* by two or more credible witnesses, to the satisfaction of the *court*, etc., shall be good and available for granting and conveying of the lands, goods, or chattels thereby given," etc. Chase's Stat. 182, 492. These several statutes are *founded upon the ordinance of 1787. [? On reference to which it will be found that the *probate of a will* is placed upon precisely the same footing as the *acknowledgement* or *proof of a deed;* both being necessary to the consummation of a conveyance of lands. In the language of the ordinance, "estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by the devisor, and attested by three witnesses; and real estates may be conveyed by lease or release, or bargain and sale, signed, sealed, and delivered by the grantor, and attested by two witnesses; provided such wills be duly *proved*, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose." Chase's Stat 66. These requisitions for the proof of wills and deeds have never been *substantially* departed from in all the subsequent legislation that has been had upon the subject to the present time. And so far as any alterations have been made therein, they have invariably been to *limit* and *restrict*, rather than loosen and enlarge the forms and the manner of proof in regard to conveyances of real estate. To warrant the belief that a policy so long and steadily pursued, grown up and established by constant and *continued* acts of legislation, has been *suddenly abandoned* for the loose and uncertain system of the English law, it must be manifested by evidence of the clearest and most *positive* intention. No inference, however natural, which is drawn from the mere *silence* of the legislature, will be sufficient to establish it. In the act before us there is not only no positive evidence of any intention to dispense with the necessity of *probate* in order to perfect a conveyance by will, to change the *forum* before which probate should be made, or to alter the mode

and manner of proof; but as far as *inference* can go, the plainest indication of a design to adhere to and *confirm* the long-established policy. Thus the act provides for the examination of witnesses before the judges of the court of common pleas; it provides for the recording and perpetuating of the testimony offered to establish the will; it requires the will to be *recorded* and the *original* filed away in the clerk's office of the court where probate is made; and lastly, it declares the effect of probate to be *conclusive* on all parties interested, unless set aside by bill in chancery, on a direct application for that purpose, made within two years thereafter. The care thus taken over the whole subject to preserve the *original will*, together with the testimony taken to establish it on the files 8] *and records of the court, to declare the effect of probate, is utterly inconsistent with the idea that it was, notwithstanding the intention of the legislature, to commit the whole policy of probate to the *mere option* of a claimant; leaving him at liberty either to prove his devise before the court of probate, or to establish it before another tribunal, where his title under it was impeached. Why create a tribunal with so much care and solemnity, and require it to proceed with such form and deliberation for the very purpose of *probate*, if it were not intended to compel a resort to it?

But again, in the act before us, in that now in force, and in the previous legislation upon the subject, no distinction whatever is drawn between *realty* and *personalty*. Wills of both must be *executed* in the same manner; they must be *proven* and *recorded* in the same manner; and the same *evidence* which is required of the validity of the one is equally requisite of the other; the same provision which demands probate of the one exacts it of the other. Will it be contended for a moment, that the law, in terms or in spirit, in any one particular, creates a difference between them, or that there is any essential difference in the *nature* of the subject which requires the application of a different rule to each? Or will it be contended that a will of *personalty* would be good without probate? So far as any such difference may be thought to exist, it should seem to be in favor of extending the more liberal construction to wills of personal estate. Devises of *land*, unlike those of personalty, were unknown to common law. They are pure creatures of the statute, and should be especially held, in all matters connected with them, to a conformity and compliance with the law which called them into being. Why, then, seek to create a difference between them,

when the statute does not require it? Good policy forbids that the same will which conveys personal and real estate should be differently adjudged of by different tribunals. As, in the case before us, that it should be held *void* for the *personal* estate, and *valid* for the *real*—as though the real estate were of less importance, in contemplation of law, than the personal. The objection here taken to the establishment of separate jurisdictions for the settlement of the same question, is strongly enforced by the chancellor in the case cited by the defendants' counsel from Vanderheyden *v.* Reid, 1 Hopk. Ch. 414. "This result, he says, of an artificial division of jurisdictions can never be proper where it may be avoided. That a will should be adjudged *valid* because *the testator who made [9 it was of *sound mind*, and that the same will should be adjudged *void* because the same testator was *insane*, is a result which should never take place under one system of laws." *A fortiori* should never take place under the *same law*, creating and applying the same regulations to each without exception or distinction.

The views above taken render it unnecessary to examine at length the positions and authorities presented by the defendants' counsel. However appropriate they might be to a system grown up entirely from the common law, they have no applicability to one which is the mere creature of statutory enactments. By the common law of England, in New York, and some of her sister states where the common law rule has been adopted, a marked distinction has always been drawn between wills of *real* and those of *personal* estate—not only in regard to *probate* and the effect thereof, but in regard to the *execution* also. In England, from the earliest period, wills of personalty were proven only in the ecclesiastical court before the ordinary, whose decisions allowing or disallowing them were in all cases conclusive. Troller on Ex. 76; Swinburn on Wills, 432, 436. And the only proof which could be, or is required at law of their due execution, is an exemplified *record of probate* under the seal of the ordinary. Ib. Devises of land, on the other hand, were not allowed at common law. They were first authorized by the statute 32 Hen. 8, c. 1. And as neither that nor any other subsequent statute provided any special jurisdiction for their proof, they were left to abide the rules of the common law, in the same manner as other conveyances of real estate, *i. e.*, they were subjected to proof, on the trial at law, in every case when the devise was contested. And hence, in

regard to these, no court of probate was established. Not so in Ohio—courts of probate always have existed for their proof under precisely the same regulations as were applied to personal estate. Indeed, in every act of legislation on the subject, both matters have been included in the same section, without any notice whatever of a distinct classification. So far, then, as the English rule can be applied to this state, it favors the views we have above taken. For by that, whenever probate is required (as in the case of wills of personal estate), the record thereof furnishes the only legitimate evidence of their due execution.

The other position of the defendants' counsel, "that inasmuch as the validity of a will depends upon the proof of facts, which 10] *ought to be submitted to a jury; and inasmuch as the court of common pleas sitting as a court of probate have no authority to impanel a jury to decide upon those facts, a claimant by devise would be deprived of the benefit of a trial by jury if probate of the will were refused," is much more specious than solid. In the first place it assumes that which is by no means conceded, that the court of common pleas sitting in probate have no power in a doubtful case to call in the aid of a jury to try the validity of a will. The constitution of Ohio, art. 3, sec. 5, declares that "the court of common pleas in each county shall have jurisdiction of all probate and testamentary matters." But it nowhere points out how that jurisdiction shall be exercised. The statute is equally silent upon the subject. Both, therefore, having conferred a jurisdiction over the subject matter, without having prescribed the mode of proceeding in the investigation of it, have left it to the court to adopt its own mode of proceeding, so far as the same is not forbidden by established law. No *direct* power is given to the court to take the depositions of absent witnesses, except by issuing a commission with the will annexed, to take the deposition of a subscribing witness. And yet we apprehend, it is incident to their jurisdiction that they may issue a like commission to take the deposition of an absent witness, to prove *insanity* in the testator, and that, too, if thought proper without annexing the will. For the power to take testimony, whether at home or abroad, is requisite to the due exercise of their jurisdiction. And there seems to be no good reason why they may not call in the aid of a jury to assist them in determining a doubtful question. In New York, where the court of probate is modeled after the

ecclesiastical court in England, it is held that an issue may be awarded to try the validity of a will; although the statute, creating that court, like ours, is entirely *silent* on the subject. And the reason assigned is, that the law being silent, has left it to the court to "adopt its own machinery," in the administration of its powers. 1 Hopk. Ch. 411–413. And there seems to be no law which forbids an English prerogative court from awarding an issue for the trial of facts. 1 Hopk. Ch. 412, and cases cited.

But if no such power were supposed to exist, the argument is still without peculiar force. 1. It would be just as applicable to wills of *personal* as to those of *real* estate; and in a country becoming highly commercial, the personal estate may be, and ofttimes is, far more important than the real. 2. It is by no *means uncommon to create special tribunals for the decision [11 of matters, sometimes of the greatest moment, without the intervention of a jury. Of these may be enumerated the exclusive jurisdiction of the judges of the Supreme Court in matters of *divorce* and *alimony*, where questions affecting the most important relations in life are determined; so also the jurisdiction conferred upon the commissioners of counties, and the appeal granted therefrom to the court of common pleas in the matter of roads and highways, where interests in land, to a large extent, are constantly involved. 3. It might well have been thought by the legislature, that as wills generally include both real and personal estate, it would be unjust, and perhaps almost uniformly defeat the intention of the testator, to establish one as to *real* estate, and hold it for naught as to *personal*. And hence, if on an *ex parte* application by the devisees, or those claiming under the will, there was not sufficient evidence to establish it as to *personalty* before the court of probate, it ought not to be taken before a different tribunal to establish it as to the *realty*.

The policy of our law requiring the proof of all wills, whether relating to real or personal estate, to be exhibited before the court of probate, is by no means peculiar to Ohio.

In Massachusetts, whose enactments are not more imperative than our own, it is held that "the *exclusive* jurisdiction of wills, whether of land or personal estate, belongs to the court of probate; and that the decree of that court can not be inquired into." 12 Mass. 525; 16 Ib. 433; 1 Pick. 549. In the case from Pickering the court say: "The experience of us all, on the bench and at the

bar, will justify the assertion, that no instance has occurred of a will being attempted to be proved otherwise than by the decree of the probate court; or, if appearing to be so proved, of any attempt to defeat it by evidence to the jury." Ib. 549.

In Maine, the same course of decision has been adopted. Small *v.* Small, 4 Greenl. 225; Moore *v.* Smith, 5 Ib. 494. In the first of these cases, it is said, page 225: "The question, whether an instrument, purporting to be a last will and testament, ought to be allowed as such, is one of purely probate jurisdiction." In the second, page 494, it is said: "The probate of wills is within the exclusive jurisdiction of the courts of probate."

In Connecticut, the probate of a will before the court of probate is conclusive, whether of realty or personalty. Swift's Dig. 143: 1 Day, 170.

So also in Virginia. 1 Leigh, 293.

12] *In Ohio, it has been determined, by a uniform and constant course of practice, that the proper evidence of a devise is the certificate of probate; and it is believed that no instance has occurred, until the present, of an attempt to establish a devise by any other means.

But the question, we think, may be regarded as virtually, if not directly decided by this court, in the case of Wilson's Ex'rs *v.* Tappan, 6 Ohio, 174. There it was held that under a will made in another state, the legal title to land devised does not vest in the devisee until the will has been admitted to probate, and recorded in the proper county. And yet the statute (sec. 12 of 1824, sec. 14 of 1831) declares wills duly proven in any other state or territory, relative to property in this, "good and valid in law, in *like manner* as those made in this state are declared to be"—placing them both in the same situation, so far as the matter of probate and record is concerned.

STARR, for the plaintiff:

The decision of the common pleas in rejecting the will did not destroy it; because it may again be presented and established upon fuller evidence. 6 Ohio, 148.

The rejection, says the court in this case, extinguishes no right and binds nobody, for there are no parties before the court to be concluded.

It appears from a memorandum on the back of the will, in the handwriting of the clerk, that it was presented for probate in 1831,

and admitted to the probate and ordered to be recorded, but a new hearing being allowed, it was finally rejected.

The right of the defendants to set up their title by devise is the same, I conceive, as if there had been no decision of the common pleas in relation to it.

1. The validity of the will depends upon the proof of facts; and if the defendants can not set up their title by devise, they may lose it without the possibility of having those facts passed upon by a jury.

The law has made no provision for a jury to decide upon the validity of a will when presented to the court of common pleas for probate. It is only when a will has been admitted to probate and contested by bill in chancery, as pointed out in section 20 of the act relating to wills, that it can be submitted to a jury. When thus contested it is made the duty of the *court to award an [13 issue to be tried by a jury, whether the writing be the last will of the testator or not. It is then only that an appeal lies from the common pleas to the Supreme Court. 29 Ohio L. 246; 6 Ohio, 149.

2. The title of the devisee is complete when the will is executed according to the requisitions of the statute, and the testator is dead, subject only to the right of the executor to sell for the payment of debts. The statute requires that the will shall be in writing, signed by the testator, and attested and subscribed in his presence by two or more credible witnesses, who saw him subscribe it, or heard him acknowledge the same.

When thus executed, the estate vests in the devisee on the death of the testator before entry. Co. Lit. 111; 2 Kent Com. 533.

3. Section 7 of the act authorizes any person interested in a will to cause it to be presented to the common pleas for probate, and points out the mode of proving it. It authorizes the proof of such "circumstances as *would be proper to prove such* WILL *on a trial at law.*" When could it be proper to prove a will on a trial at law if not in just such a case as the present?

Section 8 provides that a certified copy of the will and probate under the seal of the court "shall be as effectual in all cases as the original will would be if *produced* and *proven.*"

The law of 1795, adopted for the government of the territory, made the probate of a will essential to the validity of a devise or bequest of personal property. 1 Chase's Stat. 182.

The same may be said of the act of 1805. 1 Chase's Stat. 142.

Sections 8 of the acts of February, 1808, of February, 1810, and January, 1816, provided "that no written will should be considered valid in law till presented to the court of common pleas for probate, and proven by two at least of the subscribing witnesses." 1 Chase's Stat. 572, 680; 2 Ib. 930.

In the acts of February, 1824, and February, 1831, this provision is omitted, making an entire change in the law on this subject.

4. In England, the probate of wills respects personal property only, and is a subject of ecclesiastical jurisdiction; but a devise or no devise of real estate is a question of common law jurisdiction, and triable in the common law courts, and in every case of a contested devise the execution of the will must be proven. With us, after the will has received probate in the common pleas, it is conclusive as to its validity, in regard both to real and personal 14] *estate, so long as it stands uncontested under section 20 of the act respecting wills; but the rights of the devisee of real estate, and legatee of personal property, are no more the same after probate than before. They are placed under different restrictions, and this results from the nature of the difference between real and personal estate. Until probate of the will the legatee has no right of which the law takes the least notice. It manifests his inchoate property; but even then he has no title, for the title to personal property bequeathed by will, even in the case of a specific legacy, both before and after probate, is in the executor. He may maintain trespass against the legatee for taking it away; or if the legatee be in possession of a specific chattel bequeathed to him, he can not retain it in opposition to the executor, though the assets be fully adequate to the payment of debts. The *assent* of the executor is requisite to perfect the right of the legatee, unless the legacy be chargeable upon real estate, and then he may recover it out of the real estate before probate. Toll, Law of Executors, 305; 2 Blk. Com. 502; Roberts on Wills, 77; 2 Atk. 361.

The probate of the will forms no part of the title of the devisee, nor is it essential to it. If the will be executed according to the requisitions of the statute, his title is perfect on the death of the testator. If he have no title till probate, lands devised would be

in a strange state of abeyance between the death of the testator and probate.

The constitution of the state, article 3, section 5, which declares that the court of common pleas in each county shall have jurisdiction of all probate and testamentary matters, has the effect to vest the jurisdiction of the ecclesiastical courts in England, so far as wills are concerned, in the courts of common pleas. But as *that* jurisdiction did not extend to devises of real estate, neither the constitution of the state nor the act organizing the judicial courts makes a question of devise or no devise *solely* triable in the courts of common pleas as courts of probate. Toll, Law of Executors, 68-75.

The fact that the court may admit a will to probate and thereby make the title of the devisee unquestionable till some one thinks proper to contest it according to the provisions of section 20, does not invalidate this position.

5. The law of New York in regard to the execution of wills is similar to the law of Ohio. Every will, whether of real or personal estate, or both, must be signed by the testator in the *presence of two attesting witnesses, who shall sign their [15 names at the end of the will, at the request of the testator, with their place of residence. 2 R. L. N. Y. 7.

In that state a will is admitted to probate by the surrogate of the county, who records the will and the proofs. His certificate of probate on the original will, or on an exemplification of the record signed by him and attested by his seal of office, is admitted in evidence. With regard to the personal property mentioned in the will, it is conclusive of its validity until reversed on appeal or revoked by the surrogate himself. As to the real estate, "it shall be received in evidence, and shall be as effectual in all cases as the orihinal will would be if produced and proved, and may, in like manner, be repelled by contrary proof." 2 R. L. N. Y. 3-5.

The only difference between the law of New York and of Ohio is, that the law of the latter state makes the probate by the common pleas conclusive for the time being as to both real and personal estate.

In the case of Bogardus et al. *v.* Clark et al., 1 Edward's Ch. 266, a bill was filed for the partition of certain real estate of which John Fisher died seized. It was resisted by the defend-

ants on the ground that John Fisher had made a will devising the same real estate to them. The will had been presented to the surrogate of the county and admitted to probate. There was an appeal from his decision to the chancellor, who reversed it on the ground of insanity in the testator.

The vice-chancellor decided that though the will depended upon the same state of facts and circumstances, the mental capacity of the testator, neither the decision of the surrogate establishing the will, nor the decree of the chancellor reversing it, had any effect whatever in establishing or invalidating the will as respected the lands, and only effected the personal property. 4 Kent, 3d ed. 510, n.; 1 Paige Ch. 171; Hopk. Ch. 408; 3 Wend. 503; 2 Phil. Ev. 190; 2 Atk. 370; 1 Russ. & Myl. 103; 6 Cowen, 178; Adams on Eject. 261–270; 5 Cowen, 719; 1 Stark. Ev. 337; 3 Ib. 1682; 3 Adam's Ec. 79; 1 Huggard's Ec. 311.

If the defendants can not set up their title by devise because there has been no probate of the will under which they claim, it must be because they are prohibited by some statute of the state. There is no statute which forbids it in terms. Is it because 16] *the statute provides for the probate of wills of both real and personal estate in the courts of common pleas, and makes it conclusive for the time being? I can not see it. Their right to set up their title is sustained by every principle of the common law, not that the common law gave the right to devise, but when given by the statute of wills it is sustained or defeated by the principles of the common law. Probate in the ecclesiastical courts was not necessary. It is conceded to be a principle of the common law that "no testamentary paper of personalty can be admitted in evidence until it has received probate in the ecclesiastical courts, which have exclusive jurisdiction over wills of personal estate." In the case of King v. Nethersal, 4 Term, 258, Lord Kenyon said: "We can not receive any other evidence of there being a will in this case than such as would be sufficient in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will in all questions respecting personalty." This is, no doubt, a principle of our law, and probably of all the states in this Union. Whoever would set up a claim to personal property under a will must show a probate of that will in the proper

tribunal. 9 Cranch, 151; 3 Cond. Rep. 317; 12 Wheat. 169; 6 Pet. Cond. 500; 3 Mason, 508; 1 Wash. C. C. 204, 298.

But there is no principle of the common law which makes the probate of a will of both real and personal estate the only legal evidence of the devise. So far from it, it is no evidence at all. Our statute makes the probate of a will in the common pleas legal evidence in both cases so long as it stands, and this, I conceive, is the only difference in the two systems. The will in this case can not be rejected but on the ground that the statute in effect provides that there shall be no legal evidence of a devise of real estate except the probate of the will in the common pleas, thereby making the principle of the common law, which is applicable to wills of personal estate only, apply to devises of real estate.

6. A devise of real and a bequest of personal property are, from their nature, subject to different rules. It is clear that were it not for section 14 of the act regulating wills, a devise of lands in Ohio made in any other state according to the laws thereof, would not pass the lands unless made in accordance with the laws of Ohio. It is equally clear that were that section of the act expunged from the statute book, a will of personal *property [17 in Ohio made in another state or in a foreign country according to the laws thereof, by one having his domicile there, though not according to the laws of Ohio, would be a good bequest of such personal property. It is also well settled that if the owner of personal property in this state, but having his residence in a foreign country, should make a will of such personal property according to the laws of Ohio, but *not* according to the laws of such foreign country, it would not be a valid bequest of the property here. 1 Bin. 336; Story's Con. of Laws, 393, 394; 4 McCord, (S. C.) 418.

These distinctions proceed upon the well-known principle that movable property is governed by the law of the domicile of the owner; and real estate by the law of the place where it is situated. Story's Con. of Laws, 358; 2 Ohio, 124.

It may well be questioned whether section 14 of the act gives to the foreign testator the capacity to make a will of lands in Ohio unless he be twenty-one years of age, though he have the capacity to devise lands at an earlier age by the laws of the state where he resides. There is nothing in the case of Wilson's Ex'rs v. Tappan, 6 Ohio, 174, decisive of this question.

But with regard to personal property in Ohio, the capacity of the testator to dispose of it by will, living in another state or in a foreign country, could not be made a question, if qualified by the laws of such state or country, even if this section was omitted. With regard to wills of personal estate this section makes no new law. 1 Hugg. 498; Story's Con. of Laws, 363.

The same persons to whom lands descend on the death of the owner in Ohio are entitled to distribution of his personal estate. In other words, the law of descents and of distribution is the same. But if the owner of real and personal estate situate in Ohio has his domicile in a foreign country at the time of his death, the descent of his real estate and the distribution of his personal property may be to very different persons. His lands will descend according to the laws of Ohio. His personal property will be distributed according to the law of his domicile. Story's Con. of Laws, 402, 405–407; 3 Paige Ch. 331, 408; 5 Ves. jr. 785; 3 Ib. 207; 4 Wheat. 1; 4 Cond. R. 371; 21 No. Amer. Jurist, 101; 17 Ib. 75.

18] *GRIMKE, J., delivered the opinion of the court:

The question to be decided resolves itself into another of still greater importance; and that is, whether the probate of a will affects the realty; for, if it does have this effect, it will be very difficult to escape the conclusion, that the sentence of the probate court, whether it be one of acceptance or rejection, is indispensable to give validity to the will, and that it is conclusive upon the matter which it professes to decide. In England, a will of personal property need not be attested by any witness, though it is now proposed, among other changes of judicial reform in that country, to make the attestation of two witnesses necessary to wills of real and personal property. The ecclesiastical court has exclusive jurisdiction of a will of personalty. It is proved *in the common form* by the executor, who deposes that it is the last will of the testator. If a mixed will, containing a disposition of both real and personal property, is there offered for probate, the proof is the same, and the probate only affects the personalty. So far as regards that, the probate, while unrepealed, is conclusive; the validity of the will can not even be tried by a jury; though it is now also proposed in that country to submit the will to be tried on the issue of *devastavit vel non*, in analogy to a will of land.

In Ohio the law is very different. The statute of 1824, which

was in force at the time this will was executed, rendered the attestation of two witnesses necessary to both species of will, and also required that both should be submitted to probate. It declares that the executor, etc., *may* cause the will to be brought before the court of common pleas; and "may" means "must," in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved. Our law, then, declares that where personal *or* real property is devised, the will must be offered for probate. It does not confine the proof to a will of personalty, as it would have done if it had not intended to depart from the English law, and to introduce a new rule into Ohio. In England the ecclesiastical courts have, from time immemorial, entertained jurisdiction only of personal bequests; and it is for that reason, that on the trial of an ejectment in that country, a will of land is treated as a deed, and must be proved in the same way. The only exception is, that where the original will is lost, the probate then becomes evidence.

When a will of real property is offered for probate, in Ohio, a sentence of some kind is pronounced upon it; the proof is declared *to be sufficient or insufficient; in the one case it is [19 accepted, in the other rejected. If it is rejected, it may still be repropounded for probate; and if it is received, it may still, within a prescribed time, be impeached by the verdict of a jury, and a consequent decree in chancery. Can the sentence be questioned collaterally? If it can, it will afford the example of an open inconsistency with the general genius of our jurisprudence. No maxim is better settled than that the judgment, unreversed, of a court of competent jurisdiction, is conclusive. The rule is even stronger in relation to a court of probate than it is to a common law court. In the last, the judgment is binding upon parties and privies only; in the first, it is obligatory upon all the world; a distinction which has been recognized in a great variety of forms, in determinations made in our own country. 6 Ohio, 255; 11 S. & R. 428.

By our law, a particular tribunal is appointed to receive probate of a will. It does not signify that it is not *by name* a court of probate, that it is the court of common pleas, with a probate side to it. The same court has jurisdiction of both chancery and common law controversies; and yet, this mixture of powers would not avail as an argument to prove that its equity jurisdiction was

different in kind from that of the courts of chancery in England or South Carolina.

I am aware that the decisions in the other states, upon the precise matter which we are now considering, are by no means uniform, a fact which may be accounted for either from some peculiarity in their statutes, or which is more probable, from the difficulty which the mind has felt of renouncing English adjudications as to the different effect of the probate upon real and personal property, even after the introduction of a new law upon the subject. In Pennsylvania, the probate is *prima facie* evidence on the trial of an ejectment. 5 S. & R. 212; 10 S. & R. 84. In Massachusetts, it is conclusive. 16 Mass. 433. And I should judge, from comparing the two cases in 14 Johns. 407, and 12 Johns. 192, that the probate in New York was treated as only *prima facie* evidence; for, in the one case, parol evidence was resorted to, and would have been received if it had been sufficient; in the other, the probate constituted the only evidence.

If the sentence of the court, upon the validity of a will of land, were permitted to be re-examined and controverted on every trial, in which some one of the devises in it constituted a part of the title, it would produce great confusion and mischief. It would be difficult to say when a will should be considered as established. 20] *The finding of a jury, in a collateral suit, that it was the will of the testator, after it had been rejected by the appropriate tribunal, would present a case of *irreconcilable* conflict between two opposite determinations, and if a verdict should also (as it necessarily must) have the power of annulling the will, after it has been established, it ought, also, to draw after it the further consequence of declaring the grant of administration illegal; and yet it could not have this effect without confounding every idea of stability in the administration of the law, and permitting one tribunal to usurp the acknowledged authority of another. The will would at one and the same time be a valid and an invalid will, and public confidence in the probate court would be greatly shaken, if not entirely destroyed. These are mischiefs for which no compensation could be found in the uncertainty and confusion in which all private rights would be involved.

The case of deeds is very different from that of wills. The law has not appointed any judicial tribunal to hear proof of the former, and to establish their validity. The reason is, because the

former do not draw after them such a train of consequences as the last, the grant of administration, the rights of creditors, etc., all of which it is indispensable to settle immediately on the death of the testator, and which are so indissolubly connected with the fact of the validity of the will, that the sentence of some tribunal appears to be necessary, in the first instance, either to establish or to reject it.

There is a difference between the acts of 1808 and 1824. The former contains a clause which is omitted in the latter, and which declares that no written will should be valid till probate was had. But if every alteration in the law were to authorize new views and new rules, there never would be any certainty. It is very common in framing new statutes to omit clauses which were contained in antecedent ones, merely because they were unnecessary and superfluous; and that such was the intention in the act of 1824 is, I think, manifest. Therefore, until this will is established in the probate court, it can not be admitted in evidence.

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*SAMUEL BAIRD ET AL. v. BILLIONS KIRTLAND AND JONATHAN FOWLER ET AL. [21

Where there is an absolute conveyance of land, intended as a mortgage, and a separate covenant by the grantee, to reconvey to the grantor on the payment of a sum of money, the equity remaining in the grantor can not be sold upon an execution at law.

In selling a mortgagor's interest in the mortgaged premises upon execution, the valuation must be of the entire estate. It is not competent for the valuers to make an estimate of the value and deduct the incumbrance.

THIS case was submitted to the court in Trumbull county on bill and demurrer.

The facts charged in the bill are substantially as follows: At the March term of the court of common pleas of Trumbull county, 1833, Samuel Baird and others, the complainants, recovered a judgment against Jonathan Fowler, one of the defendants. On this judgment a writ of *fi. fa.* was issued, bearing date July 1, 1833, which was levied on one and one-half acres of land in the township of Poland, in said county of Trumbull, which land is

particularly described. The land was subsequently sold at sheriff's sale, and purchased in by the complainants, and the sale was approved by the court.

This land had been the property of Fowler, but on October 11, 1832, he conveyed the same to Billions Kirtland, another of the defendants, by deed absolute upon its face, Kirtland at the same time executing to Fowler a bond in the penalty of one thousand dollars, conditioned that he would reconvey upon the payment by Fowler of three hundred and sixty-five dollars, with interest, in which sum he was indebted to Kirtland.

The land was not appraised at its full value, but was appraised under the incumbrance, and was sold by the sheriff accordingly. After this sale, the complainant tendered to Kirtland the three hundred and sixty-five dollars due to him, with interest, and demanded of him a release of the premises, which was refused.

On May 13, 1833, Campbell, Jones, and Opie, three other defendants, recovered a judgment against Fowler in the Ashtabula county court of common pleas. Upon this judgment, execution was issued on the same day, and was levied on the same one and one-half acres of land; and on the 23d day of the same month they filed their bill in chancery, in the court of common pleas of Trumbull county, to subject the equitable interest of Fowler in said land to the payment of their judgment. In this case such proceedings were held, that on April 27, 1836, this equitable interest was sold to Logan, another of the defendants. This sale was approved by the court, a deed made to Logan, and he took possession of the land.

The prayers of the bill are, that Kirtland may be decreed to release to the complainants his interest in the premises; that 22] *Logan may be decreed to surrender the possession to them, and that they may be quieted in their title.

To this bill there is a demurrer.

TODD and HOFFMAN, for the complainants, insisted:

1. That Fowler held an interest as mortgagee in the land in dispute.

2. That this interest was at law subject to execution.

3. That the levy of the execution originally made upon the land was kept good.

4. That the appraisal was properly made, and the incumbrance properly taken into consideration.

They cited Wright, 249; 4 Johns. 43; 6 Johns. 296; 2 Ohio, 223; 2 Bin. 978; 1 H. Blk. 117; 1 East, 299.

SPALDING, for the defendants, argued:

That inasmuch as the deed from Fowler to Kirtland was an absolute deed, Fowler held no other than an equitable interest in the land, and that upon such interest the judgment of the complainants could not operate as a lien; and that this equitable interest could not be sold in execution. In support of these positions, he cited 6 Ohio, 162; 1 Ohio, 314–320.

He further insisted, that as the land was levied upon as a legal estate, it should have been appraised at its real value in money, and not subject to an incumbrance.

Judge HITCHCOCK delivered the opinion of the court:

Upon looking into the facts of this case, the first question which suggests itself is, why the complainants have come into a court of equity. There is no community of interest among the defendants. If Kirtland stands in the situation of mortgagee, and in equity there is no doubt that he does, and these complainants have a right to redeem, then it is true their remedy is in this court. But as to Logan, the only object is to recover from him the possession, which could be much more appropriately done by action of ejectment. It is true there is a prayer that the complainants' title may be quieted; in order, however, to entitle themselves to this relief, they ought first to obtain the possession. As the defendants have not, however, on these grounds, objected *to the [23 jurisdiction of the court, I will consider the points made in the case.

It seems to be necessary to examine, in the first place, whether Fowler had any interest in the land in controversy, upon which the judgments of the complainants operated as a lien. If he had, then the complainants have a preferable right, for the land is situate in the county where their judgment was recovered; it was the first judgment in point of time, and within one year from its rendition execution was taken out and levied. The provision of the act regulating judgments and executions, that the lands and tenements of the judgment debtor shall be bound for the satisfaction of the judgment from the first day of the term in which judgment is entered, is applicable only to legal interests in lands and tenements; to such interests as can be sold upon execution.

Nor does a lien always attach where there is such an interest as may be sold on execution. When a judgment is recovered against a person in possession of lands, those lands may be sold upon execution, and as between the purchaser and execution debtor, the sale may be good; still no other person having a better right than the debtor would be affected by such sale. But if the debtor has no other than a mere possessing right, the land is only bound from the time of the levy of the execution.

In order that a judgment may operate as a lien the defendant or judgment debtor must have a legal title. It may be supposed that this opinion is contrary to those decisions of this court which have gone to sustain sales of mortgaged premises made in execution against mortgagors. It is not our intention to deny the authority of those decisions; we suppose that a mortgagor, where a mortgage is legal, has a perfect title to the mortgaged premises as to all the world, except the mortgagee or those claiming under him, and also as to him until the deed becomes absolute at law by failure to comply with the condition of defeasance. Of course upon such mortgaged premises the lien of a judgment might possibly attach, and the same might be sold in execution. In speaking of a legal mortgage I would be understood as speaking of a mortgage where the condition of defeasance constitutes a part of the deed. In such case the payment of the debt secured by the mortgage would discharge the mortgage; and in case the mortgagee should commence an action of ejectment, if the mortgagor could show that the debt was discharged he would defeat the action. 14 Johns. 43.

It is insisted, in the present case, by the counsel for complain-
24] ants, *that Kirtland held the premises in controversy merely as mortgagee; that the land was conveyed to him merely as security for the payment of debt. No doubt, in a court of equity, this deed was a deed of mortgage, but at law, the whole title to the land passed out of Fowler; true, he took back a bond conditioned, not that upon the payment of the sum of money therein specified this deed should be void, but that Kirtland should reconvey. Kirtland might at once have had an action of ejectment, and the payment of the money would not have secured Fowler in the possession. The only legal right remaining in Fowler was a right of action upon the bond, provided he first paid the three hundred and sixty-five dollars and interest. In

equity he might, upon such payment, compel a reconveyance, but at law he had no interest in the land; therefore the judgment of the complainants could not operate as a lien upon this land.

If Fowler had nothing more than an equitable interest in the lands in controversy, it follows, of course, that the complainants acquired nothing by the sheriff's sale under which they claim title; for no principle is perhaps better settled in our jurisprudence than that a mere equity can not be sold on execution.

Had this, however, been a case of legal mortgage, it is perhaps doubtful whether these complainants would have acquired any title in consequence of the sheriff's sale. Probably, however, as this sale was approved by the court issuing the execution, so long as that order of approval remained in full force and unreversed, the title would be held good. But we have no doubt that the sale was irregular and never should have been approved; strip this transaction of the forms by which it is incumbered, and what was in fact sold under the execution of the complainants? What was appraised? Was it the land? Certainly not; but it was the interest which the judgment debtor had in the land; hence this interest was a right existing to redeem the land upon the payment of a certain sum of money; in other words, it was a mere equity of redemption. This was all that was appraised, and was all that was sold under a pretended sale of the land itself. This is an interest which in chancery may be subjected to the payment of a judgment, and if a judgment creditor wishes to subject it, he should seek his remedy in that court. 29 Ohio L. 84.

But if the judgment creditor prefers to take his execution and proceed against the lands of his debtor, he must be governed by the statute regulating the sale of this species of property. Section *10 of the act regulating judgments and executions pro- [25 vides, "that if execution be levied upon lands and tenements, the officer levying such execution shall call an inquest of three disinterested freeholders, who shall be resident within the county where the lands taken in execution are situate, and administer to them an oath or affirmation to appraise the lands so levied on; and the said freeholders shall return to the said officer, under their hands and seals, *an estimate of the real value in money of said estate*, upon actual view of the premises, forthwith after such view." 29 Ohio L. 103. The word "*estate*," in the last clause of the section, is used in the same sense with the word "*land*" in the former. It is

not the interest of the debtor in the land, but the land itself which is to be appraised; and this land can not be sold by the sheriff for a sum short of two-thirds of the appraised value. The sheriff's deed when executed, it is true, conveys nothing more than the interest of the judgment debtor, nor could the debtor himself convey anything beyond this. But it is the intention of the law that two-thirds of the actual value of the land shall be received, otherwise it shall not be sold.

Appraisers have but one thing to examine and ascertain, and that is the "value" of the land "in money." With the title they have no concern, with incumbrances they have no concern; and they can not with any more propriety take into consideration a mortgage incumbrance, than they can the lien of a former judgment or the possibility of a claim for dower. Taking into consideration the one or the other of these, or anything else than the value of the property, they violate the spirit of their oaths, and their appraisal is not in conformity with the law, and ought not to be sustained.

In the case under consideration, the appraisers did not return to the sheriff, under their hands and seals, the "*real value in money*" of the estate. They deducted from this "*real value*" a large sum of money supposed to be due from Fowler to Kirtland, and returned the balance as the value, and for two-thirds of this balance the land was sold. There is no doubt but they acted honestly, but it was under a misapprehension of the law.

Upon a view of the whole case, the court are of opinion that the demurrer is well taken, and the bill will be dismissed with costs.

26] *AARON VALENTINE *v.* WILLIAM S. SMITH ET AL.

When the plaintiff takes a rule upon the sheriff to bring in the body of the defendant, he can not afterward take an assignment of the bail bond.

RESERVED in the county of Hamilton.

This is a writ of *certiorari*, to reverse an order of the court of common pleas of Hamilton county, staying the proceedings in an action of debt brought by the plaintiff against the defendants, as the ap-

pearance bail of Wm. S. Smith, on a bail bond executed to the sheriff and assigned to the plaintiff.

The facts are stated in the bill of exceptions. They are these: The original suit was commenced by *capias* on April 20, 1832, returnable to the August term following. The defendant was arrested, and on the 28th of May, with Lovell and Williams, as sureties, gave the bond in question. On the 25th of September, it being of the August term, the plaintiff obtained a rule on the sheriff to bring in the body of Smith, in three days, and filed a declaration *de bene esse* in the original action.

The rule on the sheriff was not served, and after it was entered there was an understanding between the attorney for the plaintiff and the sheriff that it was *waived*, but no entry of such waiver was made on the journal.

On June 29, 1833, the plaintiff took an assignment of the bail bond, and commenced a suit against the bail; and, at the appearance term, the court ordered the proceedings to be stayed, on filing special bail in the original action, and paying the costs in the suit against the bail. In this last suit, the plaintiff, on January 8, 1835, filed a declaration. In April following, special bail having been given in the original action, and the costs paid in the suit against the bail, in pursuance of the former order of the court, and Smith having surrendered himself in discharge of his special bail, and filed his plea in the original action, the order to stay proceedings was made final.

The counsel for the plaintiff contend that this *order* is erroneous: 1. Because the court of common pleas had no authority to stay the proceedings; and 2. If the court had the authority, it should not have been made without requiring of the bail that judgment should be entered against them to stand as security for the plaintiff in the original action.

Wright and Hodges, for the plaintiffs:

On this state of facts we insist:

1. That the proceedings in the suit, on the appearance bail bond, could not, without the consent of the plaintiff, be stayed, [27 after a term had been lost by plaintiff, at which he might have obtained judgment, in the original action; and the loss of the time having accrued by the neglect of the defendant to enter special bail.

2. That, at least, the proceedings could not be stayed without

judgment being entered against the defendants in the appearance bail bond suit, as security for the plaintiff in the original action.

The law regulating these proceedings in regard to bail, is found in 29 Ohio Laws, practice act, sections 22–26, inclusive.

Section 24 provides that when plaintiff *has lost* a trial for want of special bail being put in, in due time, before proceedings on the appearance bail bond shall be stayed, court shall require that defendants consent that judgment be entered up against them for plaintiff's security in the original action.

This is our case, and as this was not required by the court, the order staying proceedings, without such judgment, was irregular.

Section 23 specifies the terms on which proceedings on appearance bail bond may be stayed, when the plaintiff has *not* lost a trial for the want of special bail being filed in due time. Those terms are as follows:

1. That defendant file and perfect special bail.

2. That he pay the costs incurred by the assignment and proceedings in suit on appearance bail bond.

3. Receiving a declaration pleading issuably in the original action, and taking short notice of trial. All these prerequisites must be complied with before the proceedings can be stayed when a term has *not been lost* by neglect to put in special bail.

It will be observed, 29 Ohio L. 60, that special bail must be filed on the return day of the *capias*, or on the succeeding day. If not, proceedings may be had on the appearance bail bond.

Declaration *de bene esse* was filed in the original action before November term, 1832, so that judgment might have been obtained or trial had at that term, if defendants had entered special bail. It is at August term, 1833, that defendant asks proceedings stayed; the third term after the appearance term of the suit in the original action.

3. In the third place, we insist that the terms on which the
28] *court ordered the proceedings stayed, are not in compliance with the requisitions of the statute; but even the terms that were imposed, were not fully complied with till nearly two years after the order of court to stay proceedings. The order does not require the defendant to plead issuably to the original action, nor does it require that the defendants in the suit on the bail bond consent that judgment be entered against them on the bail bond for the

plaintiff's security, both of which requisitions are by the statute as peremptory as the others imposed.

For these reasons, we insist that the order to stay proceedings in the bail bond suit is irregular, erroneous, and can not be sustained.

The proceedings in regard to bail are regulated by statute, and the law is explicit and peremptory. By the neglect or refusal of the defendant to enter special bail in the original action, the plaintiff lost several terms at which he might otherwise have had a trial and judgment. And we assume the position that no practice different from this, if any such prevail, can control our statute. We are not aware, however, of any practice differing from that for which we here contend.

That part of our practice act which relates to bail will found to have been taken nearly *verbatim* from different parts of Tidd's Practice. We refer to volume 1 of that work, chapter 12, page 245, and *passim*. It will there appear that the practice contended for by us is fully sustained.

But whatever may have been the English practice, it should be borne in mind that their practice is regulated by rules of court; ours is regulated by *special law*.

We will here dispose of one or two objections that have been urged in the former discussions of this subject.

It is said we insist on strict technicalities, in order to fix the bail in this case. If this is an objection that requires an answer, we will state that the principal defendant in the bail bond suit is indorser on the note on which the original suit is brought, who is probably released from his liability as indorser by strict technical rules, and no injustice is worked by his being made liable in the bail bond suit by technicalities.

It is said the rule taken on the sheriff to bring in the body of defendant Smith, was a waiver of our right to take an assignment of appearance bail bond. The rule was never served on the sheriff, or in any way acted on; but if it had even been acted on, does the consequence follow? The English practice at present *is es- [29 sentially like ours; but formerly under their practice an assignment of bail bond could not be taken till after a rule on the sheriff to bring in the body. See 1 Tidd, 245; also, 1 Seld. Prac. 190. Because this preliminary is no longer essential, can it follow that mere entry on the journal of a rule on the sheriff, and never served on him or any way acted on, discharges the appearance bail? The

proceeding is between the sheriff and the plaintiff; the bail have nothing to do with it. The law gives the plaintiff the benefit of the bail bond if he will take it; of course he may waive his rule and take it.

Another objection that has been urged is, that it is the policy of the law to save bail, and prevent imprisonment for debt; and that imprisonment for debt is nearly a dead letter in public opinion, which ought to be regarded. If this is a substantial objection, I must be pardoned for saying I do not feel the full force of it. So long as the law remains upon the statute book as it is, we should be governed by it; but if it is condemned in the opinion of the public, it will soon give place to a different one. It is in this way only, I take it, that the judicial tribunals become acquainted with *public opinion*.

WOODRUFF, for the defendants:

The errors assigned by plaintiff are:

1. That the court of common pleas ordered the proceedings in said suit on the bail bond to be stayed, on giving bail and paying costs, without requiring judgment to be entered upon said suit as security.

2. In this, that said court ordered the proceedings in said suit to be stayed.

In arriving at a conclusion in this case, three material questions present themselves:

1. Is an order for an exonerator the subject of writ of error?

2. Had not the court of common pleas power, under all the circumstances, to order the proceedings on the bail bond to be stayed as above set forth?

3. Did not the plaintiff, by his own act, waive his right to proceed against the appearance bail?

As to the first question, it appears to me, both upon principle and authority, that a writ of error does not, nor ought it to lie upon an order for an exonerator. In 9 Serg. & Rawle, 24, a question is raised upon this very point.

30] *The order of the common pleas, staying proceedings on the bail bond, is matter discretionary with the court, and often arises on a state of facts which do not and can not appear on the record, as was no doubt the case in the present instance; and if the court do exercise the power, it ought to be presumed that it was properly exercised.

It may have appeared to the common pleas that the plaintiff had not lost a trial.

"Matters which would induce a court to stay proceedings on a bail bond constitute a subject of legal discretion, and not of error." 2 Rawle, 198.

An additional reason why the court ought not to entertain a writ of error on the order of the court entering an exonerator, arises from the impossibility of placing the parties in *statu quo*, in case the order should be reversed.

It is a maxim of law that bail should be viewed favorably, and that no act of the principal should operate prejudicially to the bail. Had no rule on the sheriff been resorted to at the August term, 1832, but an assignment of the bail bond been taken, the appearance bail would have been apprised that special bail was called for; but by taking a rule on the sheriff, and then by a private understanding with him that it should be waived, was calculated to mislead the bail. To reverse the order made by the common pleas would be placing the bail, by an act over which they had no control, in a much worse condition than they were in before said order was made, and give the plaintiff an advantage which in justice he ought not to have.

2. Had not the common pleas power to make the order they did?

It will be observed in the present case that the bail bond was not assigned until June 29, 1833. After the August term, 1832, to which the original writ was returnable, and suit was brought upon it, to August term, 1833, at which term special bail was entered, and afterward in the same term, defendant in the original action surrenders himself in discharge of his bail, who are *exonerated* by order of court, and defendant committed to charge of sheriff.

It is to be presumed that the plaintiff being in court, in the eye of the law, ought to have objected to the surrender; as he did not, his silence ought to preclude him from afterward pursuing the bail, particularly when a declaration absolute and plea had been filed in the original action, as was the case in the present instance.

*It will also be observed that a rule was taken at the August term, 1832, on the sheriff to bring in the body of the defendant. This rule operated as a waiver of special bail. It was a subsisting rule on the minutes of the court, and never appears to [31

have been revoked or annulled. It was certainly, to say the least, calculated to throw the bail off their guard, and they had a right to suppose that the plaintiff intended to proceed against the sheriff under the rule; and whatever understanding may have existed between the sheriff and the plaintiff's attorney, in relation to the rule being waived, as is suggested in the bill of exceptions, such agreement or understanding ought not to affect the rights of the bail, as the rule was subsisting by virtue of the plaintiff's own act, and no step had been taken by him to bring the cause to trial; he, the plaintiff, can not be said to have lost a trial up to August, 1833, and such, most probably, was the view taken by the common pleas.

But, suppose the plaintiff had lost a trial, it was through his own neglect. See Coleman and Caine's Cases, 62, where the court say that "it is not a loss of trial alone which will prevent our interfering to relieve in these cases, but that loss must be without neglect on the part of the plaintiff, and must be occasioned by the delay of the defendant, *after bail is called for.*" If a different practice was allowed, a plaintiff would be tempted to wait a term and thus ensnare the bail.

The court will always stay proceedings, if application be made for that purpose, *on the return of the bail bond writ.*

In the case under consideration, application was made *on the return of the bail bond writ.* The order was made, special bail entered, and afterwards exonerated by a surrender of the principal at the same term. The principal, then, was not injured by this act, the bail had a right to surrender the body either before or after special bail given, and the body being surrendered, he had the highest security that he could ask, and it was for the court of common pleas to judge whether the principal had lost a trial, for it is not every delay that can be said to occasion the loss of a trial, even though the term may have passed, in which, by the most speedy course of law, a trial might have been had.

3. Did not the plaintiff by his own act waive his right to proceed against the appearance bail?

By section 10 of the practice act of this state, 29 Stat. 60, it is provided that if special bail be not put in and perfected in due 32] time, the plaintiff may proceed on the bail bond, *or *rule* the sheriff to bring in the body of the defendant. By this provision of the law, the plaintiff has his *election*, to proceed on the bail

bond, if special bail is not put in, or to rule the sheriff, etc. If he makes his election he is bound by it, for by the very act he tacitly consents to waive his remedy against the bail, and manifests his choice to proceed against the principal; he can not proceed against both. Upon this point I would refer to Beecher *v.* Summons and Andrews, 7 Johns. 119; 1 Archbold's Prac. 80–92; 1 Com. Dig. 673; Swift's Dig. 596; 2 S. & R. 421.

No case, I believe, can be found where both remedies have been allowed.

Inasmuch as the plaintiff, in the present instance, caused a rule to be ordered against the sheriff, from that moment his election was determined; nor could he afterward revoke it, especially upon an agreement between himself and the sheriff. The granting of the rule was the act of the court, and it could not be nullified by the act of the plaintiff; so that the suggestion contained in the bill of exceptions in relation to this matter can have no weight as against the discharge of the appearance bail.

Another point which suggests itself, and may be worthy of consideration, is the fact, that a declaration was filed on October 18, 1832, as it is said (*de bene esse*); whether there can be such a filing under our practice is very doubtful. If a declaration is filed *de bene esse*, in what does it differ from one filed absolute? For what purpose is it filed *de bene esse?* Is it to await the production of the defendant's body under a rule against the sheriff, or to await the filing of special bail, or for some other purpose? There is no reason or necessity, in my humble opinion, for such a filing under our practice, for the statute expressly provides that upon return of service, the defendant may be declared against. The party being therefore in court, upon the return of the *capias* served, the filing of the declaration operated as a waiver of special bail.

However this may be, it appears to me that the plaintiff having filed his declaration absolute, on March 30, 1835, receiving a plea thereto, and taking judgment in the original action, after a delay on his part to proceed regularly against the bail bond, precludes him from his remedy against them.

STORER and SPENCER submitted an argument for defendants.

*WRIGHT and HODGES, in reply: [33

Counsel commence with a mistake, which probably has misled them, as to the question of delay, through their whole argument.

On the first page, it is stated that defendant, Smith, pleaded to

the original action "August 20, 1833, and on *the same day* judgment was rendered on submission to the court for the plaintiff." The records show that he pleaded at February term, 1835, and that judgment was then rendered. By his refusal to pay costs, according to the order of the court, at August term, 1833, and plead, he prevented our obtaining judgment till that term, but still he complains of our delay.

A word on the subject of diligence. The law makes it the *duty* of the defendant to enter special bail on the first or second day of the return term of the writ. It is not made the duty of the plaintiff to *compel* him to do so. The appearance bail also undertake that he *shall do so*. Should they not see that he does it, or do it for him? See Huguet *v.* Hallet, 1 Caine, 56.

The appearance term was permitted to pass without special bail being entered, and in due time thereafter plaintiff files his declaration *de bene esse*. *Could he do more?* If he had, he would have lost his recourse against appearance bail. See Candee *v.* Kelley, 7 Ohio, 2d part, 210, where this is fully sustained. Counsel seem to admit it in their argument. Sufficient forbearance was exercised toward defendant to enable him to enter special bail, without subjecting him to cost or trouble on appearance bail bond. He neglected it till plaintiff had lost a term, at which judgment could have been had. Assignment was then taken. The delay, if any, was favorable to the defendants. There is no time within which assignment shall be made and suit brought. See Graham's Prac. 140 (N. Y.), which says this may be done "*at any time.*" See People *v.* Wyatt, 6 East, 215. The cases cited by counsel refer to proceedings against sheriff, where different rules apply.

After the order of August term, 1833, to which exceptions were filed, what course did defendants pursue? They neglected to comply fully with that order, and still complain of delay. Had the plaintiff any other alternative but to await their performance of those conditions, or proceed in the bond bail suit? If plaintiff had proceeded and taken judgment in the original suit without insisting on a full compliance with the terms of the order, should 34] we not now have been met with the argument that we *had, by so proceeding, waived our rights and lost the benefit of our exceptions to the order? Assuredly, and with justice, too. We are again compelled to proceed in the bail bond suit before we can get the terms of the order complied with. The entry of Feb-

ruary term, 1835, is not an order; it is merely a certificate that the terms are complied with.

From the history of the case, as disclosed by the records, it is apparent that defendant, Smith, was resorting to every expedient for delay, both in putting in special bail and in complying with the order of August term, 1833, in order to arrange his affairs so that he might surrender himself in discharge of his bail, take the benefit of the insolvent law, and so pay off the debt.

Another position assumed by the counsel is this: "If the sheriff is ruled to bring in the body, an election is made by plaintiff, which confines him to that remedy exclusively." In support of this position, reference is made to 1 Selden's Pr. 176; also, Brooke v. Stone, 1 Wils. 223. The point decided there is, that if plaintiff has taken an assignment of the bail bond, he shall not afterward have a rule on the sheriff to return the writ. Also, 7 Ohio, 210. The point there decided is, that after plaintiff had accepted a plea and taken a judgment against defendant, he can not afterward sustain an action on the bail bond. The authorities cited by defendants' counsel do not conflict with the positions maintained for the plaintiff.

Judge Wood delivered the opinion of the court:

In an action against appearance bail, the statute vests in the courts of this state a discretionary power, intended to be sufficiently ample to effect all the purposes of substantial justice. The object of bail is to secure the defendant's person to respond to the judgment. When this is accomplished the design of the law is, in ordinary cases, fulfilled. When no real injury has accrued, but a technical right of action only exists against the bail, it would be a reproach to the administration of justice if there was not power, somewhere, to stay or arrest the proceedings. For such a case the legislature have endeavored to provide, by giving to the court, when the proceeding is pending, full authority over it, so far as justice may require. This authority is derived from sections 22, 23, 24, and 25 of the "act to regulate the practice of the judicial courts." 3 Chase's Stat. 1676. Section 22 enacts "that the proceedings on the bail bond may be set aside, if irregular, or stayed if regular, upon terms, in order *that a trial may be held in the original action." Sec. 23. [35 "That when the plaintiff, in the original action, has not lost a

trial for want of special bail being filed in due time, the court, or judge, may stay the proceedings on the bail bond, upon putting in and perfecting special bail, paying the costs incurred by the assignment and prosecution of the bail bond, receiving a declaration in the original action, pleading issuably and taking short notice of trial." Sec. 24. "That when the plaintiff has lost a trial, in the original action, for want of special bail being filed in due time, it shall be the duty of the court, before the proceedings be stayed on the bail bond, further to require that the bail consent that judgment be entered against them, on the bail bond, for the plaintiff's security; and, in such case, if the defendant fail in the original action, the bail shall be liable to immediate execution," etc. The statute confers upon the courts of this state, powers similar to those which are exercised by the courts at Westminster. 3 Chit. Pr. 389; 3 Har. Jur. 1984–1986; 1 Arch. Pr. 98. If a trial had been lost in the original action, because bail above had not been put in, the king's bench would not stay the proceedings, in a similar case, without requiring the attachment against the sheriff to stand as a security. Arch. Pr. 99. If a trial had been lost, in this case, the court of common pleas should have required the bail to consent to the entry of judgment against them, on the bail bond, to stand as the plaintiff's security, before the proceedings were stayed. But had a trial been lost? If not, it is not contended there is anything erroneous in the order to stay. Besides, it is settled that the loss of trial must be without the laches of the plaintiff, Barnes, 103; 3 B. & P. 221; or the court will not impose on the bail the judgment against them as the condition to stay. Whether a trial has been lost or not must be ascertained by the court; it is not to be inferred from the lapse of a term, or several terms, when the plaintiff might have had judgment, had he been diligent, if special bail had been perfected. The plaintiff must show all the facts and circumstances, necessary to prove a loss of trial, by affidavit. Rex v. Sheriff of Surrey, 5 Taunt. 606. The evidence on which the court of common pleas acted, is not contained in the record. That court, undoubtedly, found from the testimony, that there had been no loss of trial, etc. It is our duty to presume such was their finding until the contrary appears. The inference the law raises is, that every court does its duty

36] *and does right; and he who would reverse a judicial proceeding must point out the error. The court of common pleas

acted on such evidence as was produced. That court was the judge of its weight, its credibility; and although its conclusion may have been different from what ours would have been, had we been called to decide on the same evidence, its decision was a subject of sound discretion in that court, and not liable to revision in ours. Indeed, it may well be doubted, whether error will lie to the common pleas on an order to stay proceedings against bail. In King et al. *v.* Bank of Gettysburg, it was solemnly determined by the Supreme Court of Pennsylvania, that matters which would induce a court to stay proceedings on a bail bond, constituted a subject of *legal discretion*, and not of *error*. 2 Rawle, 198. I am not authorized by the court, however, to say that this point is determined. It was not deemed necessary to be settled in this case, as its decision could not vary the result.

But there is another and more satisfactory ground, perhaps, to sustain the order of the common pleas. The record shows that at the return term of the *capias* against the defendant, in the original action, the plaintiff obtained a rule against the sheriff, to bring in the body of Smith in three days. This rule was entered of record. The inquiry then arises, whether, after the entry of such rule, the plaintiff could take an assignment of the bail bond? If he could not, the court of common pleas was most clearly right, by virtue of its inherent power over its process and proceedings in similar cases, in staying the proceedings against the bail, on that ground alone.

We have not been able to find any adjudicated case directly in point. There are those, however, which bear a striking analogy. In Baker *v.* Simmons, impleaded with Andrews, the Supreme Court of New York determined that a plaintiff having elected to proceed on a bail bond to a judgment, and having charged the bail to the arrest and his principal in execution, could not be afterward permitted to waive those proceedings by filing common bail in the original suit, and proceeding to judgment therein. That the remedies were inconsistent with each other, and both could not be pursued; that such a course would be oppressive. 7 Johns. 119. At Westminster, after taking an assignment of the bail bond, the plaintiff can not proceed against the sheriff; but the rule does not seem to hold *e converso*, for he may rule the sheriff and then take an assignment of the bail bond. 1 Seld. *Pr. 176, 190; 1 Wil. 223. But the decision of this question [37

must depend mainly on the construction of section 10 of the practice act. 3 Chase's Stat. 1675. That section enacts, "That if special bail be not put in and perfected in due time, the plaintiff may proceed on the bail bond, *or*, rule the sheriff to bring in the body of the defendant." The language of this section is in the *alternative*. The plaintiff may proceed on the bail bond, *or*, rule the sheriff. *Can he do both?* Such an inference seems to us to be excluded by the language used. He may *elect* which of the alternatives he will pursue, but when such election is made he is bound by it. The rule on the sheriff being entered of record is evidence of the plaintiff's election, and while it remains he *can not* take an assignment of the bail bond. It is said the rule was not served; but that can make no difference, for the entry of the rule determines the plaintiff's election.

It is contended this was waived by a verbal understanding; but to this the bail were not parties, nor had they any knowledge of the fact. The entry of the rule was notice to all interested of the plaintiff's election. The bail, seeing it, would rest satisfied they could not be made liable on any future assignment of the bond to the plaintiff, and would take no steps to indemnify themselves of their principal. At all events, such rule could not be discharged by a private, verbal agreement, unknown to any but the sheriff and the plaintiff.

In any point of light in which we have been able to view this case, we think the judgment of the common pleas ought to be affirmed. We come, perhaps, more satisfactorily to that conclusion, from the fact that it appears from the record, that the body of Smith is still in the custody of the sheriff, to respond to the plaintiff's judgment, and the object he had in view in commencing the original action by *capias* is fully attained.

38] *ISAAC WALKER *v.* THE MAD RIVER AND LAKE ERIE RAILROAD COMPANY.

All incorporated companies for constructing roads or canals are subject to legal control in a proper case; yet chancery will not interpose such control in a controverted case of expediency of location within the proper

points; nor will chancery, in such case, interpose upon the application of a person not otherwise affected or injured than by the actual location passing through his land.

THIS cause was adjourned from the county of Seneca. It was a bill in chancery, and the bill stated that the defendants were a company incorporated to construct a railroad from Dayton to Springfield, thence to Urbana, thence to Bellefontaine, thence to or near Upper Sandusky, thence to or near Tiffin, thence to or near Lower Sandusky, thence to Sandusky, in Huron county. That the company had proceeded to lay out the road from Dayton to a point near Tiffin; but that from thence they had projected the line of the road directly across to its ultimate termination, without any regard to that provision of the act of incorporation, which requires it to be run near Lower Sandusky, which place is left at the distance of fifteen miles from the line. It is averred that no obstacle exists to a continuance of the road by Lower Sandusky, and that the line selected is to subserve the interests of a few individuals and to deprive the inhabitants of Lower Sandusky of all benefit of the road. That the complainant is the owner of lands situate on the present selected route, which is not more than one mile from the line that would pass by Lower Sandusky.

The bill further charges improper practices by the defendants, in procuring an assessment, by a jury, of the damages which complainant's land had sustained in consequence of the road, and prays an injunction against its construction. An injunction was granted in conformity with this prayer, and the case came up for hearing, on the defendant's demurrer to the bill, before the court of common pleas of Seneca county. The bill was dismissed and an appeal taken to this court.

SILLIMAN and COFFINBERY, for complainant.

RAWSON, BOALT, BEECHER, SMITH and CHAPLIN, for defendants.

The argument of counsel turned chiefly on the facts of the case comprehending the localities and character of the ground. Mr. Silliman cited Jerome *v.* Ross, 7 Johns. Ch. 315; Agar *v.* Regents Canal Company, Cooper's Equity, 77; Shad *v.* Henderson, 2 Dow. 519; Bank of Chillicothe *v.* Town of Chillicothe, 7 Ohio, 2 pt. 35.

*Judge LANE delivered the opinion of the court: [39

The statute having provided a mode for estimating damages,

in cases of this description, and thus given a legal remedy both for original action and for revision of it, before the courts of law, chancery has no jurisdiction upon that question.

The present claim for relief is not to be sustained upon the mere ground that the corporation have transcended or abused their corporate powers. Such abuses are ordinarily to be corrected by proceedings in *quo warranto*, prosecuted by the government, in which the interposition of individuals is not countenanced. 2 Johns. Ch. 371.

The great recent increase of private corporations has led courts of chancery into an enlarging jurisdiction over them, and it is now well settled that injunctions will be granted to prevent the abuse of their powers to the injury of others. These corporate powers are multifarious and of great extent. It has been justly said: "Nothing would be more pernicious than to hold that such large and extensive powers are not subject to any control. The corporation are not to be prevented from doing anything necessary to the prosecution of their undertaking; but are not to prosecute it so as to do unnecessary injury to others." Coats *v.* Clarence Railroad Company, 1 Russell & Mylne, 181; S. C., 4 Eng. Cond. Ch. 379; 2 Story Eq. 206.

The cases which justify the interference of a court of chancery should be those of clear, incontestable, well-defined right. When acts requiring judgment, science, and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed.

In this case the complainant has sustained no injury except from the transit of the road through his land, an easement to which all land in the state is subject; but which he claims to impose upon his neighbors' land, because it lies in the direct line from Tiffin to Lower Sandusky. The selection of a route for the the road necessarily involves, to some extent, a discretionary power. Where this power has been exercised, as in this case, within the appointed *termini* of the road, and within the general scope of the authority conferred on the corporation, this court will not assume to settle what degree of propinquity the line of location should bear to Lower Sandusky, especially at the instance of a stranger to that question.

Bill dismissed.

*Peter Rowland v. Joseph Rowland. [40

Where the rightful owner is dispossessed of lands and kept out of possession, he can not maintain trespass for wrongs while thus out of possession, and his action for the original trespass may be barred by the statute of limitations.

This case was reserved in the county of Richland, upon a motion for a new trial.

The plaintiff, on October 30, 1832, commenced an action of trespass *quare clausum fregit*, in the court of common pleas, which came into this court by appeal.

The declaration contains several counts, in all of which the trespass complained of is laid as having been committed in the month of April, 1826. In one count it is laid with a continuance.

To this declaration the defendant pleaded the general issue, and gave notice that on the trial of the cause he would give evidence in bar of the action; that none of the several supposed trespasses complained of were committed within four years next preceding the commencement of the suit.

Upon the trial of the cause to the jury, it was proven that in April or May, 1826, the defendant entered upon the premises and ousted the plaintiff of possession, and that the defendant continued in the exclusive possession until after the commencement of this suit, when the plaintiff regained possession by an action of ejectment.

The court instructed the jury that if they believed such to be the state of facts, the plaintiff's right of action was barred by the statute of limitations, whereupon the jury returned a verdict for the defendant.

The plaintiff then moved for a new trial, assigning for cause: 1. That the court mistook the law in the instructions to the jury. 2. That the verdict was against the evidence.

May, for plaintiff:

An actual entry upon land is not necessary to perfect a title. 3 Ohio, 236, 237.

A person having the legal title may maintain trespass against a wrong-doer, as the title draws after it the possession; and the person having the legal title will be held to have the constructive possession, unless some other person is in the actual possession

under *color of title.* 2 Johns. 22; 8 Ib. 220; 9 Ib. 147–149; 18 Ib. 40, 355.

Although the trespass committed in 1826, may be barred by 41] *the statute of limitations, yet the defendant, being in possession without color of title, every act by him committed down to the commencement of this suit, was a distinct trespass, for which he is liable, and, of course, upon these latter trespasses the statute does not operate. 4 Cowen, 329; 10 Wend. 639; 2 Hayw. 402; 2 N. C. 87.

Burr, for defendant:

A party must have the actual possession to enable him to maintain trespass. "Where an entry is followed by an ouster, the party can recover damages only for the mere trespass or entry; but if he make a re-entry, and lay his action with a *continuando* he may recover damages for the mesne profits as well as for the trespass." 2 Johns. Cas. 27; Johns. 183.

Judge Hitchcock delivered the opinion of the court:

If the instructions given by the court to the jury were correct, there can be no pretense that the verdict in this case was against the evidence; on the contrary, it was in perfect conformity with that evidence. It is only necessary, therefore, to consider whether the court was mistaken as to the law of the case.

In order to maintain an action of trespass, *quare clausum fregit*, it is well settled that the plaintiff must be in the actual or constructive possession of the premises upon which the trespass is committed at the time of the trespass. "Only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action, *quare clausum fregit;* a general property not being, in the case of real property as it is in personal, sufficient to found this action upon." The disseizee of land can not maintain an action of this nature for an injury done thereunto betwixt the time of the disseizin and his re-entry, for he does not, until his re-entry be made, regain the entry in fact of the land." 6 Bac. Abr. 566; see also Bro. Trust. Pl. 38, 305, 346; 2 Roll. Abr. 553; 2 Johns. Cas. 27; 12 Johns. 183. But it is not necessary that he should be in possession at the time of the commencement of the action. The trespass complained of may have been one by which he was actually disseized, and for that he may sue, although for any act done afterward he can not, until he

regains the possession. It would seem, however, that if the trespass be continued, and the disseizee first re-enter, he may lay his action with a *continuando*, and *recover damage for the [42 mesne profits, as well as for the first trespass. 2 Johns. Cas. 27. Or after a recovery in ejectment he may have his action for the mesne profits.

Proof of title, without proof of actual possession, is in general sufficient to put a defendant upon his defense, because the lega title draws after it the possession, as where lands are vacant the owner has in contemplation of law such possession that he may maintain trespass for an injury done to them. But if there be evidence of adverse possession, or of the possession of a tenant at will or for years, at the time of the trespass committed, the plaintiff must fail in his action. In the latter case, if the injury be such as to be prejudicial to the reversion, the lessor may have his remedy by an action on the case; but for the trespass merely the tenant alone can have an action. 6 Bac. Abr. 566, 567.

The cases quoted by the plaintiff's counsel are mostly actions of ejectment, and are not analogous to the present case. We are aware that in the State of New York, and in some of the other states of the Union, it is a settled law that a defendant in ejectment can not protect himself under their statutes of limitation, unless he is in possession under *color of title*. In truth, such is, in substance, the provision of some of those statutes; but under our statute we hold the rule to be different.

In the case under consideration, the plaintiff was in possession of the premises until April or May, 1826, at which time the defendant committed a trespass, and disseized him of the lands. From that period until after the commencement of this suit the defendant remained in possession. For this injury the plaintiff had a right of action. It accrued in April or May, 1826. But for any subsequent act of the defendant he could not have an action in this form, because not in possession. By the act of February 25, 1824, for the limitation of actions, 22 Ohio L. 325, the law in force at the time this cause of action accrued, it is provided that actions of trespass upon property, real or personal, shall be brought within four years after the cause of action accrued, "*and not after.*" This action was not commenced until October, 1832, more than six years after the cause of action ac-

crued, and was, therefore, in the opinion of the court, barred by the statute of limitation.

The motion for a new trial is overruled, and the defendant may take judgment upon the verdict.

43] *ROBERT POLLARD v. JAMES COLLIER, COMM'R OF INSOLVENTS.

Where the facts of a case, disclosed on the hearing, show no injury, but such as has resulted from the complainant's own mismanagement in suit at law, chancery can afford no relief.

THIS case was adjourned from the county of Greene. It was a bill in chancery to be relieved against a judgment at law, upon an insolvent petitioner's bond. The facts, as they appeared upon the whole case, are these:

In April, 1833, the complainant applied to the respondent, who was commissioner of insolvents for the county of Greene, and took the preliminary steps to obtain the benefit of the insolvent law. One of these preliminary steps was giving the bond upon which the judgment at law was obtained. At the April term of the court of common pleas, 1833, his petition came on for hearing, and was dismissed, because the petitioner had not complied with the law. In November, 1833, a suit was commenced against the complainant and his sureties on the insolvent bond. This suit came, in due course of law, before the Supreme Court, in Greene county, where, in June term, 1836, a judgment was rendered for the plaintiff in that suit. In August, 1834, a second application was made, by complainant, for the benefit of the insolvent act, and, upon this application, in November, 1835, the insolvent certificate was issued by the court.

The bill in this case was filed in the Supreme Court in June, 1836, while the suit on the bond and the second application for relief were both pending and undetermined. The sureties in the bond were not parties complainant, nor was the original creditor, or any other creditor parties defendant. The bill prayed an injunction and general relief. The defendant answered and detailed the facts of the case, as above set forth. Upon this bill and answer the cause was heard.

ELLSBERY and SMITH, for complainant.
HARLEN, for defendant.

Judge LANE delivered the opinion of the court:

It is a satisfactory objection to granting relief on this bill, that it has no proper parties. One of several obligors to a bond seeks relief against it. Such a bill must be brought by all the obligors as complainants, unless in a special case of collusion.

Passing this objection by, the complainant presents no case for relief. The cause for dismissing the petition does not appear *from the proceedings upon it. There is a suggestion that [44 it was because no satisfactory account of losses was given. It certainly consisted in some non-compliance with the law. No error is imputed to the court, and, if such error occurred, it can not be corrected, in this manner, before this court. It would seem that the petitioner failed in obtaining relief, either because he mistook the amount or miscalculated the effects of his proofs. He presents, therefore, nothing but the common case of a failure for some fault of his own, which makes no case for equitable relief. 2 Ohio, 312. Bill dismissed.

SAMUEL BIGGERSTAFF AND MARY HIS WIFE, CALVIN LUZEN, LUTHER LUZEN, AND SUSANNAH LUZEN, BY JEREMIAH EVERITT, THEIR GUARDIAN, *v.* MARY LOVELAND, HENRY LOVELAND, AND CLARINDA LUZEN.

Under the scire facias mortgage law, in proceedings by the mortgagee to enforce his debt against a decedent mortgagor's lands, it is sufficient if the mortgagor's personal representative alone was made defendant.

THE complainants in this case are the heirs at law of Calvin Luzen, late of Sandusky county, deceased, and the bill is filed to redeem certain land under a mortgage incumbrance, and which has also been sold for taxes.

As the facts of the case are stated in the opinion of the court, it is unnecessary to introduce them here.

HOPKINS, for complainants, cited American Chan. Dig. 233; Jeremy's Equity, 183.

YATES, for defendants, cited 1 Ohio, 157; 4 Ohio, 495; 2 Cowen,

195; Wright, 248; 2 Tidd's Pr. 1007; 1 Term, 267; 3 Term, 46; Cro. Eliz. 896.

HITCHCOCK, J., delivered the opinion of the court:

The facts of this case, so far as it is necessary to state the same for the purpose of understanding the points decided, are as follows: On December 4, 1824, Calvin Luzen, father of the complainants, being indebted to one Sheldon Chapin, of Buffalo, in the State of New York, in the sum of eighty dollars, to secure payment, executed to Chapin a mortgage upon lot No. 88, in the town of Lower Sandusky. Before payment was made, Calvin Luzen died, leaving the complainants his heirs at law, and the de-
45] fendant, Clarinda Luzen, his widow, and *Samuel Treat was appointed his administrator. On November 4, 1829, Chapin commenced a proceeding by *scire facias* in the court of common pleas of Sandusky county, to subject the mortgaged premises to sale, in order to satisfy his debt. In this case, Treat, administrator of Luzen, was sole defendant. In due course of time, judgment was rendered in this case, and the mortgaged premises sold at sheriff's sale to Joseph Loveland; the proceedings in the sale were approved by the court, and a deed executed on May 19, 1832.

In December, 1831, the taxes upon said lot being in arrear, the same was sold at tax sale to Henry Loveland, one of the defendants, and pursuant to this sale a deed was executed to him by the auditor of the county, on the 15th day of the same month of December.

Joseph Loveland died in 1834, leaving the defendants, Mary Loveland, and Henry Loveland, together with one Aaron Loveland, his children and heirs at law. On the 10th of February, after the death of their father, Henry and Aaron Loveland conveyed all their interest in the lot number 88 to the defendant Mary, since which time she has been in possession, receiving the rents and profits.

The prayer of the bill is, that the complainants may be let in to redeem the land from the effect of the mortgage, and also of the tax sale, and for general relief.

So far as respects the sale for taxes, although we are not prepared to say there is no case in which a court of chancery can interfere, yet, in a case like the present, the law has made ample provision for the redemption of land so sold. And where there is specific re-

lief provided by statute, it would be extraordinary for a court of chancery to interfere and grant similar relief. Its jurisdiction extends only to cases where there is not complete and adequate remedy at law; not to cases where the legal remedy is plain, adequate, specific, and complete. On this ground, then, if there were no other difficulties in the way of the complainants, this bill must be dismissed. For, from aught that appears in the case, the defendant, Mary Loveland, has a perfect legal title to the premises in controversy, in virtue of the tax sale in 1831.

But how is it with respect to the mortgage? The complainants wish to redeem, but they have not made the original mortgagee a party to the suit, nor have they brought any money into court. These defendants are not the assignees of Chapin, the *mort- [46 gagee. They do not claim in his rights, but they claim as purchasers at sheriff's sale. In such case under our law, the purchaser acquires not the right or interest of the judgment creditor, but of the judgment debtor. If, as is contended by the plaintiffs, they were no parties to the judgment in *scire facias*, if their rights were not concluded thereby, then their title to the lands in controversy remains good as to all the world, except as to the mortgagee, and they would, under the circumstances of this case, have plain and adequate remedy at law by action of ejectment.

But to decide the case upon this ground would not settle the controversy between these parties.

This controversy grows out of the question whether the complainants, the heirs of Luzen, are, by the proceedings in *scire facias*, divested of the equity of redemption, or of their interest in this lot of land, they not having been parties to the record. This is the question which has been argued by counsel, and although it would more properly have arisen in an action of ejectment for the recovery of the possession of the land, still we think it advisable to dispose of it in the present case.

As a general rule, none but parties and privies are bound by a judgment. And upon ordinary judgments against personal representatives, the lands of decedents can not be seized in execution. Still there can be no doubt that it would be competent for the legislature to change this rule of law, and probably there would be no great inconvenience resulting from such change, except that it might in some cases interfere with our most equitable rule respecting the distribution of a deceased person's estate among his

creditors. It is supposed by the counsel for the defendants, that by the act of January 2, 1810, "providing for the recovery of money secured by mortgage," this rule was so far changed, that when under the provisions of that statute a judgment was recovered against the personal representative of a mortgagor, the mortgaged premises might be seized and sold on execution. 1 Chase's Stat. 645. This statute is now repealed, and it is to be hoped that the proceedings which have been had under it will not be lightly interfered with. If it were a new act, one under which there had been but little practice, and were it now for the first time submitted to the court for construction, probably we should not entirely concur with the counsel for the defendant in his argument. The first section provides that if the conditions of the mortgage are not complied 47] with, the mortgagee, *his heirs, executors, administrators, or assigns may "sue out a writ of *scire facias* against the mortgagor, or mortgagors, or his, her, or their heirs, executors, or administrators," etc. Generally where a suit is authorized by statute to be commenced against the "*heirs, executors, or administrators*," of a deceased person, we should conclude that the suit must be brought against one or the other, according to the nature of the particular cause of action. If it was one in which the heirs were bound, or had a peculiar interest, the suit should be brought against them, otherwise against the executor or administrator. If, however, we were to adopt this principle in the construction of this statute, no difficulty would be removed. The debt secured by a mortgage may be a mere simple contract debt, in which the heirs have no peculiar interest, although they have an interest in the security given for that debt.

By the second section of the act, it is provided that after judgment, the plaintiff might have an execution of *levari facias*, in virtue of which the mortgaged premises might be levied upon and sold, "under the same regulation that lands and tenements are or may be by law disposed of, for the satisfaction of judgments." But upon this judgment, although the mortgaged premises were entirely insufficient to satisfy the debt, no other property could be seized in execution, and so far the proceedings are in the nature of proceedings *in rem*. But in the third section of the act it is provided, "that if the mortgaged premises so taken in execution be not sufficient to satisfy said judgment, then the residue of said judgment so remaining unsatisfied, shall be deemed and taken to

be a debt of record, for which the plaintiff or plaintiffs may issue a writ or writs of *scire facias*, and proceed therein to judgment and execution, as in other cases." The object of the statute was to give a summary remedy to the mortgagee, by enabling him in one action to recover or liquidate his debt, and to subject the landed security to the satisfaction of it. If the suit was against the representatives of the mortgagee, so far as the liquidation of the debt is concerned, it would seem to be proper that the personal representatives should be parties; so far as the lands were to be affected, it would be equally proper that the real representatives, the heirs, should be parties. Still the statute is in the alternative. The mortgagee is authorized to "sue out a writ of *scire facias* against the said mortgagor or mortgagors, *or* his, her, or their heirs, executors, or administrators."

There can be no doubt that under this act the mortgagee might *prosecute his *scire facias* against the personal representa- [48 tive of his mortgagor. He is expressly authorized to do it. He has done it in this case. What would be the consequence, to hold with the counsel for the plaintiffs, that upon the judgment rendered, no execution issued could be levied on the land mortgaged? It would be to decide that the mortgaged premises were in effect released from liability for the debt. For it has been holden that a judgment upon the *scire facias* extinguishes the bond, bill, note, or other evidence of the original debt. 1 Ohio, 158.

Will it be said that, notwithstanding this judgment, the mortgagor may resort to a court of chancery and foreclose the mortgage? It was for a long time matter of doubt during the existence of the *scire facias* law, whether a bill for foreclosure could be sustained. The court were very much divided upon the subject, and this division of opinion continued until the decision of the anonymous case, reported in 1 Ohio, 253. It must be recollected, however, that this *scire facias* law under which this suit was prosecuted, although enacted in 1810, contained no new principle, then for the first time introduced into our system. It was merely a compilation or continuation of former enactments. The principle was first introduced in 1795, in a law adopted by the governor and judges of the territory from the statutes of Pennsylvania. At that time there could be no bill of foreclosure, for there was no court of chancery, or court having chancery jurisdiction in the territory. 1 Chase's Stat. 138. By the ordinance for the govern-

ment of the territory, of July 13, 1787, the jurisdiction of the court, therein provided for, was limited to a common law jurisdiction. 1 Chase's Stat. 67. And it is believed that there was no court within the territory possessing chancery jurisdiction until after the adoption of the state constitution. In seeking for the meaning and intention of the legislature, we must bear it in mind that there was no way by which a mortgagee could, at the time the principle was introduced, directly subject mortgaged premises to sale in satisfaction of his debt. He might have his action of ejectment, and recover the property, but the equity of redemption would still remain. He might have his action for the recovery of the debt itself, and subject the land to sale as in other cases; but by this course of proceeding he might be in danger of losing his lien, for he would be in no better situation than other judgment creditors. But by *scire facias* he might directly subject the land to sale, and when sold, the purchaser would take it, dis-
49] charged of the equity of redemption. Had *there been a court exercising chancery jurisdiction, it is believed that this law would never have been adopted; but, being adopted, it was continued in force long after our courts had chancery jurisdiction, long after the reason which led to its adoption had ceased.

Taking all these circumstances into consideration, in connection with the terms of the law itself, it seems to me to be at least extremely doubtful, whether, were we now, for the first time, called upon to give a construction to it so far as the particular question raised in this case is concerned, we could say that these defendants had no title, or that the equity of redemption was not foreclosed. But it must be remembered that this law, introduced at an early period, is no longer a part of our system; it has been repealed; and it is our duty to seek rather for the construction given it by the courts of former days than to give it a construction of our own. It is the contemporaneous construction that must govern. And we believe this to have been that construction, that where a *scire facias* was sued out after the death of the mortgagee, it might be sued out, according to the words of the act, against either the executor or administrator, or against the heir, according to circumstances. If there was a personal representative, the suit must be commenced against him; if not, then against the real representative. Such was the practice under the act, and it would be followed by fearful consequences to hold it to be wrong.

Such being our opinion, we hold that by the sheriff's sale these complainants were divested of all interest in the premises. The equity of redemption must be foreclosed.

The bill must therefore be dismissed, with costs.

NATHANIEL DUSTIN *v.* DAVID NEWCOMER.

When a vendor has a title, and refuses to convey, or when he disables himself from conveying by parting with the title, the rule of damages to be enforced in equity, is the value when conveyance ought to have been made.

If the contract be to pay upon conveyance, and the vendee make no actual tender of the money, he can not have costs.

THIS case was adjourned from the county of Wood. It was a bill in chancery for the specific performance of the following contract:

"This agreement witnesseth, that David Newcomer has this day sold to John C. Spink in-lot number 332, in the town of Perrysburgh, Wood county, Ohio, for fifteen dollars. And the said Newcomer binds himself, his heirs and assigns, to make, execute, and deliver a good warranty deed in fee simple, for the *lot afore- [50 said, on or before the first day of August next. And the said Spink, for his part, agrees to pay the said David Newcomer fifteen dollars, on the delivery of the deed aforesaid.

(Signed,) J. C. SPINK,

June 15, 1833. DAVID NEWCOMER.

On July 1, 1833, Spink assigned this contract to Scott for sixty dollars. It was assigned by Scott to the complainant, February 8, 1834, for one hundred dollars. The suit was commenced in March, 1835, and came on for hearing in July, 1836, when, it being shown, that the defendant had parted with the title so as to be unable to convey, the court referred it to a master commissioner to report the value of the property. The master's inquiry was made in July, 1837. From his report and the testimony, it appears that the value of the lot, August, 1833, was forty dollars; July, 1836, five or six hundred dollars. In July, 1837, the value was between two hundred and four hundred and fifty dollars.

COFFINBERY, for complainant.
MCLAUGHLIN, for defendant.

Judge LANE delivered the opinion of the court:

Between these parties time was not of the essence of the contract, but it should have been performed on the first of August. The first act should have been taken by the defendant, by tendering the deed, by which he would have been entitled to the purchase money. Accordingly, the decree of July, 1836, finds the equity with the complainant, and directs the inquiry of the value. The case was reserved to adopt the proper rule of compensation in equity, where the defendant to a bill for specific performance is unable to make a title.

The rule seems settled, in the cases cited in the note below, that where a vendor, having title, refuses, or puts it beyond his power to convey, the proper rule of compensation is the value of the land at the time the contract should have been performed. This is shown to have been forty dollars, from which the purchase money, fifteen dollars, is to be deducted, leaving twenty-five dollars the amount for which the decree may be taken.

In cases like the present, where a deed is contracted to be delivered and the purchase money paid at the same time, it is a rule 51] of the court to regard such covenants as dependent, and by *the English practice neither party can enforce without making his part of the agreement a condition precedent. Sug. Vend. 245, and cases cited. This rule is strictly adhered to by our courts in cases at law. 6 Ohio, 312. But a practice has incautiously, and perhaps improperly, crept into our chancery proceedings, under which suits for a specific performance are entertained upon an offer to perform without any actual tender of the purchase money, but in such cases the complainant takes his decree without costs.

Decree accordingly.

NOTE.—The court are indebted to a learned friend for the following collection of authorities, upon the important questions decided in the foregoing case.

What damages shall the purchaser of real estate recover, in an action against the seller for non-performance of the contract?

1. Where the vendor has made a sale under the belief that he had a title, and it is found that he can not make title, the consideration money paid and interest, with expense of examination of title, can alone be recovered. 1 Sug. Vend., paging at bottom, 235, 237. (In State Lib.)

2. But if the vendor, under the expectation that he can get in the title, agrees to sell and convey, and is disappointed so that he can not convey, he is liable in damages (though he acted in good faith) beyond the consideration money, etc. The vendee shall recover for the loss he may have sustained by not having the contract carried into effect. 13 Eng. L. 100; 6 B. & Cress. 31; 21 Eng. C. L. 102; 10 B. & Cress. 416.

3. Where the vendor neglects or refuses to convey, having title, the proper measure of damages is not the consideration money paid, etc.; but the value of the land at the time of the breach, the rule being the same in relation to real and personal property. Hopkins v. Lee, 6 Wheat. 109; Wells v. Arbethny, 5 Conn. 222; and see 2 Murphey, (N. C.) 347; Cannell v. McClean, 6 Harris & Johns., (Md.) 297, (in this case the court go into the reasons); Hopkins v. Yowell, 5 Yerger (Tenn.) 305.

In Kentucky the law is different. The consideration money and interest seems to be the criterion of damages, and will not be departed from unless the vendor has been guilty of fraud. If the vendor has been guilty of fraud, he is responsible for the value of the land at the time the covenant should have been performed. Rutledge v. Lawrence, 1 Marsh. 396; Goff v. Hawks, 5 J. J. Marsh, 341; Davis v. Lewis, 4 Bibb, 456; Seamore v. Harlan's Heirs, 3 Dana, 410; Combs v. Tarlton's Adm'r, 2 Dana, 464. Fraud in such cases consists in general in the sale of land to which the vendor knew that he had no title. 4 Bibb, 457; Gerault v. Anderson, 2 Bibb, 543; McConnell's Heirs v. Dunlap's Devisees, Hardin, 41.

In an action of this kind, questions in relation to rents and profits, improvements made by vendor, waste, etc., are said to be too complicated for a jury, and must be settled in chancery. Combs v. Tarlton's Adm'r, 2 Dana, 464, cited above.—J. R.

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*John Welsh et al. v. Simon Perkins et al. [52

Taxes accumulating upon a decedent's real estate, which the personal representative has no funds to pay, are properly debts for the payment of which the lands of the decedent may be ordered to sale.

Reserved in the county of Geauga.

The bill states that the complainants are the only surviving heirs at law of Jacob Welsh, late of the county of Geauga. That in October, 1830, Thomas D. Webb, one of the defendants, was appointed administrator on the estate of said Jacob, who accepted the trust, and in the month of November following, applied to Perkins to loan about two hundred dollars, for the purpose of enabling him to pay the taxes then due on the real estate of the

intestate. Perkins agreed to advance the money and receive the note of Webb, on interest, as security, which was accordingly done, and it was also agreed that the administrator should present his petition to the next court of common pleas, for leave to sell a certain tract of land in the county of Portage, near the village of Akron, and should sell the same for cash in hand. The bill states the order for the sale was obtained, and the sale made in pursuance of such agreement. That at the sale, Webb stated to those present, that no credit could be given for any portion of the purchase money, and by reason of such statement, the land was struck off to one Eliakim Crosby, who is also a defendant, for less than two-thirds the appraisal, and but a small proportion of the real value thereof. That this land, by reason of its proximity to the canal and the flourishing village of Akron, its hydraulic power and favorable position, was of great value and rapidly increasing, and was nearly sacrificed by such sale, while large tracts of land in the county of Geauga, belonging to the estate, might have been sold, and which would not have risen in value in the same relative proportion as that disposed of, and which should have been left by the administrator for the benefit of the estate and the complainants.

The bill states, that it has been usual for administrators to sell land on a credit, and that if these lands had been offered on a reasonable credit, a much larger sum would have been obtained. The complainants further state, that by reason of the agreement with Perkins, and the sale of the Akron lands, being so made for cash, the sale is a nullity, and, with the subsequent confirmation by the court, and deed of the administrator, does not divest the complainants of their title and convey it to the purchaser.

The bill also states, that Crosby either purchased as the agent of Perkins, and for him, or for the joint benefit of both himself 53] *and Perkins, and with full knowledge of the agreement between Perkins and Webb. The bill prays that Crosby may be decreed to bring into court, and give up to be canceled, his deed from the administrator; and, if he has conveyed any part of it to Perkins, that such conveyance may also be annulled, and for other relief.

The defendants have all answered the bill. Webb admits the loan of Perkins of one hundred and eighty dollars, to pay the taxes, which he says had been due for two years, on the land of

the estate, and that he repaid the loan with interest, in September, 1831. He states that the lands were advertised for sale; that he had no funds of the estate; that there was not time to obtain an order of court, as no time would intervene, before the land would have been sold for the taxes. That he had not money of his own; that he could not obtain it at the banks, and that Perkins, of whom alone it was to be procured, advanced it, on condition, that he would include the Akron lands in the petition, and sell for cash. Webb admits filing the petition for the sale, and that he advertised the land, in which advertisement he stated the terms would be cash, and that he sold the land, as set forth in the bill to Crosby; that it was unimproved, and he sold it for more than one-half, and he thinks for more than two-thirds its appraised value; that he gave Crosby no notice of the agreement with Perkins; that he offered other lands, at the same time, on a credit, but could get no bid for them. He states that Butler, one of the complainants, informed him the heirs wished the lands out of the county of Geauga first sold, and that he agreed to attend the sale, but, for some reason, did not do so.

Perkins admits the agreement, as stated by Webb; that in making it, he was influenced by a belief that this land would sell, and his money be refunded; and that, if no other person should bid, he would. He denies that there was any understanding, directly or indirectly, that the land should be sold to him, or any other person, for his use; nor did he expect to buy it, unless by paying more than any other person would. He does not know that any person was present for the purpose of bidding, and was deterred by the terms of sale; and he thinks it made but a little difference in the amount obtained whether it was sold for cash or on a credit. He denies any intention to defraud the complainants, or any other person. He admits the land was worth more than it sold for; but can not say what it was worth then, or at this time. In his amended answer, Perkins denies any interest in this purchase by Crosby, or in any other lands in *the vicinity, with Crosby, until December, 1831, when he [54 purchased of Crosby an undivided third part of the Welsh tract.

Crosby, in his answer, denies any knowledge of the agreement between Webb and Perkins, or that he ever heard of it, until after his purchase. He admits the sale, and thinks the adminis-

trator endeavored to sell the land to the best advantage, and he believes the sale was legal, and thinks he paid more than half the appraised value, and that the appraisal was a fair one. He denies that he purchased for any one but himself; that he paid with his own money; but admits he has conveyed an interest to Perkins, in pursuance of an agreement, made *since* his purchase, and *not* before. To these answers, there was a replication and a great number of depositions submitted by the complainants; but, principally, in relation to the value of the land, at the time, and after the sale, and did not materially vary the aspect of the case, as presented by the answers of the defendants.

PERKINS and OSBORN, for complainants.

R. HITCHCOCK, for respondents.

Judge WOOD delivered the opinion of the court, as follows:

From the present value of the property in dispute, this case is of exciting interest to the parties, and we have endeavored to give it a thorough and deliberate examination. The complainants are the heirs at law of the decedent, and seek to set aside the sale, on the ground that it is opposed to public policy, and that Crosby purchased, as the agent of Perkins, or with full knowledge of the agreement between him and Webb. Though not disclosed in the bill, another reason is also presented in the argument of counsel, and urged with distinguished zeal, and attempted to be sustained with an array of authority, that the administrator is not chargeable with the taxes upon real estate, and has no power to sell the land for their payment. We shall examine each of these positions in its order, as briefly as its nature and our duty will permit. Should we trespass beyond ordinary limits, an apology must be found in the endeavor to satisfy the complainants, with the reasons on which our conclusions are built.

It is insinuated in the argument, that some of these respondents intended fraud in fact. That position, we apprehend, may at once be abandoned, for there is not one item of evidence, in the case, that leans, in even a remote degree, to its support. The lands sold were, at the time, well sold. They sold for as much as 55] *land, in August, 1831, would ordinarily sell for, for cash in hand, more than one-half their appraised value; and what more could any reasonable man expect? The inquiry, then, as to fraud, in fact being dismissed, it remains to be settled, in the next place,

whether the agreement between Webb and Perkins *is against sound policy and void?* We have seen, by the answers of these defendants, what this contract was, and it is necessary to keep in view all the peculiar circumstances under which it was made, and more especially the fact that it not only appears, from the nature of the transaction itself, and the character in which Webb was acting, but is most indubitably proved, *that he had not one particle of interest in the sale*, which, it is claimed, resulted from his agreement with Perkins. There is also another feature in the case, which a chancellor, sitting in a matter of conscience, to do right and repress wrong, should, by no means, overlook: that Butler, one of the heirs, and the active one who managed for the whole, requested that this very land should be sold by the administrator. This is inferable, most clearly, from the evidence that he desired land sold out of the county of Geauga, and agreed to attend the sale of this very property. The administrator, when he came into the office, found the land advertised for the taxes, and to save them, as he supposed, from sacrifice, the arrangement with Perkins was made. Perkins was the only source from whence the money could be obtained. He could advance it, but required, in return, that the administrator should proceed, with diligence, to raise it for him again from the estate. He knew this land would sell; he required that it should be offered, and that the terms should be cash. Was there either moral or legal iniquity in this? It is said, if administrators may make any arrangement by which a sale may be influenced, heirs may be defrauded, and it is, therefore, prohibited. We apprehend the rule is not thus extensive; that it is limited to those cases in which the administrator has an *interest*, or may have an *interest*, and then the law refuses to trust him to make any contract for his own benefit in relation to the property of the *cestuy que trust*. Such are the numerous cases cited, and for this reason, that his interest interferes with his duty. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.* The counsel for the complainants rely much on the case of Davoue *v.* Fanning, 2 Johns. Ch. 252. No one entertains a higher opinion of the learned chancellor who delivered the opinion in that case. He has probably done more *to build [56 up a system of American chancery law than any other man living. His sound discrimination and persevering industry are worthy of

all praise. The opinion, in that case, is believed to be law by us; and it is sustained by a very learned and elaborate analysis of all the ancient and modern decisions to the time it was made. The analogy, however, between the two cases is not so easily perceived. Fanning was the executor of Davoue, and by an agreement, suffered the property to be purchased in for his wife, and executed a deed in pursuance of the sale, in trust, for her. The chancellor remarks: "Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. *His interest interferes with his duty.*" And farther, he says: "The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and *himself* becomes the purchaser, or *interested in the purchase*, the *cestuy que trust* is entitled to come here, as of course, and set aside the purchase, and have the property re-exposed to sale." Had the agreement with Perkins been for the benefit of Webb or his wife, the sale must have been set aside; but instead of that, this sale was solely intended by the administrator for the benefit of the complainants. The case of Thompson *v.* Davies, 13 Johns. 112, is also cited. That was a case between creditors, who had entered into an arrangement to bid off a debtor's property, one to purchase the personalty and the other the realty, and pay to his confederate a certain sum of money. It was held by the court that such an agreement was void. That although a creditor was not bound to bid, yet he was at liberty to do so, and if he suffered himself to be bought off, or silenced, in a way which might prevent a fair competition, or if he abstained from bidding, upon concert, under the promise of a benefit, it was the very evil the law intended to repress. This principle is, we think, at the present day universally admitted. It is salutary and necessary to repress fraud and circumvention. 6 Term, 642. In the case at bar there was no agreement to sell to any one, but everything was left open to fair and honest competition. If Perkins bought, he expected to pay more than others. Such is the evidence furnished by his answer. The case of Rogers *v.* Rogers, Hopkins, 515, was decided strictly on the same principle with Davoue *v.* Fanning. An executor took the assignment of a judgment agains this testator, and caused all his lands to be sold on execution, and himself became the purchaser. This sale was set aside. The chancellor observed: "If the exec-

57] utor *had not accepted the trust, he would have been at lib-

erty to pursue all his remedies for the satisfaction of the judgment; but where he accepted a trust, which imposed on him the duty of taking every legal and prudent measure to pay the debts of Thos. Rogers, from the personal and real estate, he was no longer at liberty to exert his rights as a creditor in opposition to his duties as executor." So far as the rights of the executor, as a creditor, were in conflict with his duties as executor, his rights were yielded to his duties. Again, he says, "a trustee can gain no advantage to himself to the detriment of those for whom he holds the trust. The most frequent application of this doctrine is in cases in which the trustee purchases the subject of his trust. In such cases equity will vacate the sale. The objects of the rule are to secure fidelity on the part of the trustee and preserve the interests of those whose rights are confided to his care. Mills *v.* Goodsell, 5 Conn. 475, merely recognizes the same principle, and declares a purchase by a deputy sheriff, on a sale made by him, void not only in equity but at law. Such is undoubtedly the rule in Ohio. Neither a sheriff can purchase of himself, nor an appraiser buy the property on which he has been called to affix a value, and for the same salutary reason, his interest would conflict with his duty. 3 Chase's Stat. 1713, sec. 18. In Hervish *v.* Grow and Brown, 5 Wend. 579, the administrators had executed a bond by which they covenanted to sell certain real estate of their intestate, as soon as they could obtain the surrogate's order, for five hundred and fifty-five dollars, and, in default, to pay one hundred dollars, as liquidated damages, and the action was brought to recover the penalty; and the same principle, which runs through all the cases, was repeated by the chief justice. He says, "administrators must sell at auction; they can sell in no other manner. The highest bidder must have the property, and to him the administrators must convey. Suppose a bidder at the auction were to offer six hundred dollars for this property, which the administrators have agreed to sell for five hundred and fifty-five dollars, they must forfeit and pay out of their own pockets one hundred dollars, according to this contract. They have every inducement, therefore, to discourage bidding, whereas their duty requires them to sell at the highest price. Such a contract is highly improper and a violation of the duty of the administrators. It is, of course, contrary to the policy of the statute and void." We have examined a great many other cases not cited by counsel. Davidson *v.*

Gardner, decided nearly a century ago, in which Lord Hardwick 58] said, "the court looks with jealous eye *at the trustee purchasing of the *cestuy que trust.*" Sug. Law of Vendors, 436; Whelpdale *v.* Cockson, before the same chancellor, in 1747. It was a bill by a creditor, against the executor, to set aside a sale. Lord Hardwick said, "he would not suffer the sale to stand. He knew the dangerous consequence; and it was not enough for the trustee to say you can not prove any fraud, for it is in his own power to conceal it." We do not know that it is necessary to pursue the cases in the books farther. The rule, in all the cases cited, receives our warmest approbation as a well-settled salutary principle in equity, that where *interest and duty conflict, the former must yield and give place to the latter.* But no case can, we think, be found like this, in which the sale has been set aside as against the policy of the laws. What has the administrator done? He preserved the residue of the estate by paying the taxes which were neglected by the complainants. It is true, one witness testifies he should have discharged them if Webb had not; but this was unknown to Webb. What, then, is this agreement, "*by which heirs may be defrauded?*" An agreement by a trustee, in which he had not a shadow of interest, to do what the statute in positive terms authorizes. 3 Chase's Stat. 1782. Unimproved lands may be sold for one-half their appraised value. The administrator may sell to the best advantage, in his own discretion, for cash or credit, and though the administrator is seldom interfered with, as to the land he shall sell, the selection is, in fact, the act of the court, for the court orders and directs the sale of the specific tracts. This land was sold, in all things, according to the statutory requisitions. It was sold at auction, to the highest bidder, for more than one-half its appraised value; and in the discretion of the administrator, to the best advantage, for cash; the heirs knew of the sale, desired this land to be sold, and the active complainants agreed to attend the sale. The avails of the sale were immediately paid in discharge of the debt created, by which the taxes were released; and, after all this, it would appear to us that an attempt to avoid this sale, by the complainants, is deserving of severe reprehension.

But if we are wrong in the view we have taken above, this sale can not be disturbed. Crosby purchased without any knowledge of the arrangement between Perkins and Webb. He bought the

whole property. In the absence of such knowledge he is protected by the order of the court directing the sale. He was not bound to go behind it. The order was sufficient for him. He *has conveyed a part of the land to Harduty and another [59 part to Perkins, both of whom are protected by Crosby's want of knowledge. 3 Ohio, 561, 562; 7 Ohio, 200; 1 Johns. Ch. 219.

The remaining point is, as to the power of the administrator to pay the taxes on the real estate of the intestate. This is denied by the complainants, but neither the case cited from 4 Mass. 358, nor 6 Ohio, 238, sustain them. In 4 Mass., it is determined that the administrator is not, as such, entitled to the possession of the decedent's lands. This is doubtless true. By the common law, on the death of the ancestor, the lands descend to the heir, and the power of the administrator over them is entirely derived from the statute.

It can not be doubted, we think, but what the taxes may be considered as debts against the estate. Such debts the statute authorizes the administrator to pay. In case of a deficiency of personal assets, he may sell the lands for that purpose. May he not, then, in an emergency such as this case presents, when he came into the trust, create a debt against the estate, by loaning money to prevent its sacrifice, and sell the real estate, under an order of court, for its discharge? We think he may. The case in 6 Ohio does not aid the complainants. It holds this salutary principle: That the heir is bound to pay the taxes, as between him and the administrator, and if he suffer them to accumulate, and bid in the lands for their discharge, it is only his own method of payment, and that such sale does not protect the lands, in the hands of heirs, against the just demands of creditors.

On the whole case, we unhesitatingly come to the conclusion that the complainants are not entitled to the relief they seek, and that the bill should be dismissed, with costs.

Judge HITCHCOCK, having been of counsel for the respondents, did not sit in this cause.

60] *Garry Lewis v. Calvin G. Sutliff and Milton Sutliff.

Where an injunction to a judgment at law, for the payment of money, is dissolved, the bill continued, and sundry payments made before its final dismissal, the decree is to be for the balance due at the time of dismissal, with the legal penalty of damages upon that balance.

This cause was reserved in the county of Trumbull, and came before the court upon the following facts:

At the November term, A. D. 1835, in Trumbull county, Calvin G. Sutliff obtained a judgment against complainant and one Matthew Acheson, for the sum of eleven hundred and twenty dollars debt, and one cent damages, with costs amounting to the sum of seven dollars forty-six and one-half cents, together on a judgment bond; and on April 23, A. D. 1836, Lewis filed the present bill in chancery against the defendants in the court of common pleas, and obtained an injunction on the judgment at law, for the reasons set forth in said bill.

On April 28, 1836, the defendants filed their answer, and at the April term, 1836, the court dissolved the injunction on the judgment at law, and continued the cause until the next June term. At the June term the cause was continued until the November term, 1836. That on June 29, A. D. 1836, Lewis and Acheson paid to Calvin G. Sutliff, on the judgment at law, the sum of nine hundred dollars, and on October 20, 1836, Lewis paid the further sum of one hundred and thirty-three dollars; all which appears on the execution docket of the court. At the November term of the court this bill was dismissed, and the court decreed that Calvin G. Sutliff should recover of the complainant the debt, damages, and costs recovered in the suit at law, with interest thereon up to the time of the dissolution of the injunction, in all amounting to the sum of eleven hundred and fifty-seven dollars fifty-three cents, with interest on the same until date of the decree, and five per cent. penalty on the amount aforesaid, amounting to ninety-six dollars seventy-five cents, and the cost of this suit; and that execution issue thereon as on a judgment at law. To avoid which decree the complainant appealed to the Supreme Court; and at the August term of the Supreme Court, in Trumbull county, the cause came on, and the complainant, by his counsel, consented that this bill of complaint might be dismissed, but objected to the rendition of

any decree in the case except for the taxable costs in this suit. Whereupon the court reserved the cause for determination in the court in bank, upon the following points, viz:

1. Whether the respondent, Calvin G. Sutliff, is entitled to a decree in this suit for the judgment and costs in the suit at law, under the present state of facts, or not?

2. Whether Calvin G. Sutliff, under the existing state of facts *and law, is entitled to any penalty, by a decree in this case, [61 on the judgment at law, or not?

W. L. KNIGHT, for complainant.

M. SUTLIFF, for respondents.

Judge GRIMKE delivered the opinion of the court:

Both of the questions presented in this case may be very shortly disposed of.

1. Is a party holding a judgment at law stayed by injunction, who, pending the bill, receives the largest portion of his debt, entitled to a decree for the whole amount? Where the injunction is dissolved, the statute makes it the duty of the court to render a decree for the respondent, for the amount of the judgment recovered at law. But this is in contemplation of a dissolution of the injunction and dismissal of the bill at the same time. It would then be proper, and would be the only correct course to render a decree of that kind. It would perhaps have been the better practice under this law, if a decree had always been considered as superseding the judgment, instead of permitting the decree and the judgment both to remain in force. As the whole jurisdiction is drawn to a court of chancery, the final decree in that court, settling the rights of the parties, and ascertaining the amount then due, might well be considered as vacating the judgment to the extent to which the decree reaches. But a different practice has prevailed, and we do not feel authorized to disturb it, inasmuch as no injustice can arise from it. When the injunction is dissolved during the pendency of the suit, full effect is necessarily given to the judgment at law. When a final decree is passed dismissing the bill, if the judgment is then also continued in operation, the decree becomes simply accumulative security for the payment of the debt, which can be but once collected. Here a large portion of the debt has been paid, pending the bill in chancery, and since the dissolu-

tion of the injunction. If the amount now due were ascertained, the decree would be for that amount only.

The second question is, whether the judgment creditor is entitled to a penalty, where the injunction is dissolved at one term, and the bill dismissed at another? And we are of opinion that he is so entitled. Chancery can not decree the penalty upon an interlocutory order dissolving the injunction. It can only be decreed on 62] the final disposition of the case, and we hold that it is *then to be calculated only upon the sum found to be at that time due. This reconciles in the most just manner the pretensions of all the parties. By receiving payments on his judgment pending the bill, the creditor is held to have waived the penalty on the amount received. The case is sent back to the county to ascertain the amount of payments. The decree will be for the balance due on the judgment, with the costs and accumulating interest; and also for the costs in chancery, and a penalty on the balance found to be due.

EXECUTORS OF GILMORE v. THE BANK OF CINCINNATI ET AL.

Lapse of time precludes creditors of broken banks from coming into equity to enforce rights, which, if freshly pursued, would be available. Under circumstances, twelve years may constitute this lapse of time.

THIS cause was adjourned from the county of Hamilton.

The original and amended bill sets forth that J. & G. R. Gilmore have recovered a judgment against the Bank of Cincinnati, for eight thousand seven hundred and eighty-four dollars and fifty-one cents and costs; that execution has issued thereon, and that no property can be found. It charges that part of the defendants are indebted to the bank for moneys loaned; that others are indebted to the institution as original subscribers for stock; that others have become the owners of shares of stock not paid up. It is charged that the bank has become dissolved by non user, that no officers have been chosen, nor has any business been done by the institution for several years past; and the prayer of the bill is, that those of the defendants who may be indebted to the bank, either for stock or otherwise, be decreed to pay their debts to the complainants, so far as may be necessary to pay and discharge their debts.

The facts established are, that the plaintiffs, and also the Bank of the United States, are judgment creditors of the Cincinnati Bank; that no officers have been chosen to manage the institution for several years; and that it has long since ceased to transact any banking or other business; and that many and nearly all of the original subscribers are indebted to the institution for portions of their subscriptions. Many of these original subscribers have long since transferred their stock. The subscriptions, however, have not been paid up.

*Fox, for complainants: [63

From the facts of the case, the following questions arise:

1. Are the original subscribers to the stock of this bank, and now holding the same, now liable to pay up the balance due on their subscriptions?

2. Are those original stockholders or subscribers who have transferred their shares, still liable to make good their original promise to pay for the stock?

3. Are any of the assignees of this stock liable to these creditors, or were they liable to the bank for the amount of subscriptions made by the first purchaser or subscriber?

4. If any or all of these classes of defendants are liable, in what way or manner shall they contribute, should all of the subscriptions not be required to pay the debts of the bank?

I suppose that there can be no question of the liability of the original stockholders to the corporation (was that in existence) to pay the amount originally subscribed for. They contracted to pay, for the several shares by them subscribed, a certain amount. The subscription by the subscriber and the acceptance of it by the bank, or those authorized to receive subscriptions, constituted a binding contract; and the subscribers must comply with this, as with any other contract. On what pretense can it be seriously contended that these original subscribers are not liable? They have made a contract—they have pledged their property to the amount of their subscriptions to the creditors of the institution for the fulfillment of its contracts. It was on the faith of their promises and undertakings being complied with, that the bank obtained its credit; and after giving a credit to the paper of the bank by the weight of their names, they ought to redeem their pledges. It is useless to argue this question. It appears to me so plain that argument is useless. The principle has been fully

recognized and acted upon in the following cases: 1 Bin. 74; 16 Serg. & Rawle, 140; 9 Johns. 217; 14 Ib. 244; 15 Mass. 522; 16 Ib. 15, 100.

In equity, it is well settled that the stock is considered as a pledge for the payment of the debts of the corporation. 3 Mason, 311; 19 Johns. 474; 15 Mass. 522; 16 Ib. 15; Hopk. Ch. 304; 8 Cow. 396.

The second question is decided by the decision of the first. If the original subscriber was at any time liable, it is by virtue of the contract he made at the time of subscribing; and he could 64] *not release himself from the obligation of that contract by transferring his stock to a third person. The original subscriber in this respect is precisely in the situation of an original lessee of an estate. He is always liable to pay the stipulated rent, because of his contract to do so, while his assignee is only liable so long as he enjoys the estate; but even the assignee's liability, while he is in the possession, does not prevent the lessor suing his lessee on his original contract. The subscriber who transferred his stock has recourse against his assignee for the amount he may have to pay, provided the assignee agreed to pay the balance due on the subscription; and, at all events, that is a matter between the subscriber and his assignee.

As to the third question propounded, I am not aware that the complainant is much interested in the result of the decision on that point. It would seem to me that inasmuch as the court have all the parties before them, both original subscribers and their assignees, if the latter would be ultimately liable to the assignee there would be no impropriety in making him directly liable. I am aware, however, that at law it has been held that an assignee of stock is not liable to a suit for the sum due on the subscription. 1 Bin. 70; 10 S. & R. 273; 14 Ib. 422.

But I understand it will be contended that the subscribers are not liable until the directors of the company have called for installments; so that if the directors refuse or neglect to make the stockholders comply with their contracts, the creditors are without remedy? Can such be the law? This question, however, has been frequently decided. In the case of Briggs v. Penniman, Cowen, 395, the court say. "The stock subscribed and agreed to be paid in to the company became corporate property, and when paid in might be reached by ordinary proceedings; *and if not paid*

in, a court of equity would compel the trustees to collect and apply it to the payment of debts." 3 Mason, 311.

The stock subscribed is the fund which the creditors depend upon for the payment of their debts. It is a fund substituted for the individual responsibility of the parties who are interested in the profits of the business. Take away this responsibility of the subscribers to the amount of stock subscribed, and what is there left on which the community can rely for the fulfillment of corporation promises? There is already an unfavorable opinion with regard to corporate institutions. They are looked upon suspiciously by many; and if the doctrine now contended for by these *subscribers shall be tolerated, such institutions will [65 not be endured. For the credit of these institutions, the subscribers ought to be held strictly to their engagements. They have promised to create a fund for the payment of their debts, and have neglected to comply with their promises. They have appointed directors to see that the contract was complied with; these directors, who are trustees for the benefit of stockholders and the creditors of the institution, have violated their trust. They have failed to discharge their duty by calling in the necessary installments, and we now ask the court to appoint other trustees, or to do that which the trustees ought to have done—compel the stockholders to pay up the amount due on their stock.

I contend, further, that the rights of the creditors are not only not affected by the palpable omission or neglect of their directors to do their duty, but that the directors and stockholders could not, by any act of theirs, deprive the creditors of their right to compel the subscribers to pay up their subscriptions. This question is directly decided in the case of Slee *v.* Bloom, 19 Johns. 456. In that case the stockholders and directors passed a resolution allowing subscribers to forfeit their stock on paying thirty per cent. on the amount of their subscriptions. It was held that this resolution could not destroy the rights of the creditors of the institution without their consent. The resolution was declared by Chief Justice Spencer, page 478, "to be against the fundamental principles of law and equity, *legally fraudulent*, and therefore void and inoperative."

But from the fact of the defendants having procured the original articles of association, I presume they rely upon those as

affording evidence of their exemption from the calls of the complainant. I have read these articles, and have discovered a clear and manifest intention on the part of the person who penned them, to repeal the law of the land by association. By the first clause of these articles, which may be deemed a sort of proclamation, it is made known and "proclaimed," that "the subscribers have formed a *company or limited partnership*," and have agreed to conduct their business under the name and style of "The President and Directors of the Bank of Cincinnati." By section 16, it is provided and "expressly and explicitly declared to be the object and intention of the persons who associate under the name or firm of the president and directors of the Bank of Cincinnati, that the joint stock or property of the said company, exclusive of dividends to be made, shall alone be responsible for the 66] debts and engagements *of the company; and that no person dealing with the company shall, on any pretense whatever, have recourse against the separate property," etc. And by the second section it is provided, that the capital stock shall consist of six hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid two dollars on each share at the time of subscribing, or in ten days thereafter; eight dollars within ninety days, and all further installments to be paid at the discretion of the president and directors. And by section 17, after providing for the payment of dividends, it is declared, "that the capital stock of the company shall never be impaired by dividends;" and if more than the actual profits shall be divided, the directors present at the declaring of any such dividends are, by section 18, made personally liable for the amount of capital stock so divided. These are all the material provisions contained in the articles of association which appear to me to have any bearing upon the question now before the court. And I must confess that I do not see how these articles of association can be made to favor the defense set up. They show distinctly that each subscriber agreed to pay fifty dollars for each share subscribed; that the whole amount subscribed was distinctly pledged to pay the debts and engagements of the company; and they contain a direct prohibition of appropriating any portion of their stock for any other purpose. As to the provision of the forty dollars per share being only payable at the discretion of the president and directors, it must be understood to be a *legal honest discretion*—not an arbitrary

unjust discretion. The directors, as just trustees, were legally bound to regulate their calls as claims against the institution required. It was their duty to have a fund to meet the demands against the institution, and it is because they failed to discharge that duty that we are compelled to ask the aid of this court.

With regard to the mode in which the subscribers should contribute, I do n't know that the complainants have any interest in discussing the question. It is more interesting to the subscribers themselves than to the complainants. I suppose that, as the subscribers are all debtors to the bank, and as we have a right to pursue all such debtors, we ought to have a decree against each for the amount of subscription unpaid. I know of no distinction that can be made. To the extent of the stock subscribed the subscribers are all debtors, and we claim, therefore, a decree against each for that sum. If one subscriber should have to pay more than a co-subscriber, the question of contribution may then *arise between them; the complainant is not interested in [67 that question.

N. WRIGHT, for respondents:

The points taken by the counsel for complainants may be included in two inquiries, viz:

1. Whether any stockholders, after assigning their stock, can be made liable for installments on the stock.

2. Whether the present holders of the stock can now be compelled, in chancery, to pay installments on stock not called by the directors.

The Bank of Cincinnati was incorporated by the general law, passed February 23, 1815. 14 Ohio L. 87, sec. 11. At this time it was an existing association, and is incorporated as such; and we suppose that the articles of association, so far as not varied or superseded by the charter, may, to some extent, form the present rules of the corporation. We have, therefore, made proof of these articles.

As to the first question above stated, it does not seem to require much argument. Both the charter and the articles of association provide for a transfer of the stock; when such transfer is made, the assignee becomes the party recognized by the bank, and is the only one with whom she has any concern. New certificates are ordinarily issued to him, and the remedy for default of payment of the installments is a forfeiture of the stock, or sale of it

in market. Banks usually require transfers to be made on their own books, thereby securing to themselves the benefit of any lien or claim they may have against the original holder. But when they have once admitted the transfer to be made, they have waived all further claim on account of the stock.

The original subscribers stand in the same situation as any intermediate holders of the stock. They are mere stockholders, and that the bank should have a right to call on them for installments, after admitting their assignees as stockholders, is most unheard of and most preposterous.

If the bank itself could not maintain such a claim, surely the present complainants can not. The bill seeks to subject debts due to the bank, and can go no further. It can not compel any one to pay anything which the bank itself could not compel. It can reach nothing but liabilities to the bank; and, of course, if the 68] *bank had no claim on such stockholders, the complainants can establish none.

The next inquiry is, whether the present holders of stock can now be compelled to pay installments *not called* by the directors.

To settle this question we must first examine the charter. Section 8 of the above law provides that one-tenth of the stock shall be paid at the time of subscribing, and the balance in such installments *as the directors shall direct*, with sundry restrictions as to the amount, time, and manner of calling installments. Public notice must be given; only ten per cent. can be called at a time, and three months must intervene between calls. If there be any doubt whether this section applies to the Cincinnati Bank, the articles of the association, article 2, contain the same provisions in substance. But we suppose that the concluding clause of section 11 makes section 8 a substitute for this article.

Section 29 provides that the whole amount of debts which the bank shall, at any time, owe, exclusive of deposits, shall not exceed three times the stock subscribed and *actually paid* into the bank; and in case of excess, the directors to be personally liable.

By the last provision it is obvious that the capital of the bank, on which she is authorized to do business, is not the nominal amount of stock, but the amount actually paid in thereon. The directors, therefore, may, if they see proper, call only one-fifth of the stock, and then can contract debts only to three times that amount. In other words, they may limit their capital to one-fifth

of the nominal amount of the stock; or, at their discretion, may increase it by calling installments to the full amount of the shares. The community, or the creditors of the bank, have no interest in the matter, and no right to complain, for their security is not diminished by refusing to call in the whole amount; because if the whole amount is called, the bank may incur debts to three times that amount; whereas, if only one-fifth is called, debts can be incurred to only three times that fifth. It operates precisely as an increase or diminution of the capital on which the bank can trade; and the directors are, by the charter, vested with the discretion to fix the amount of that capital.

Now, under such a charter can it be said that there is any constructive contract or obligation by the stockholders to pay any installments beyond what the directors see fit to call? The circumstances of the times may render it expedient for the bank to confine itself to a small business; the issues of the bank must be *restricted accordingly, and, of course, its profits will be [69 ratably small. The directors alone are vested with the discretion to decide on this matter. It is an important discretion, and no others can exercise it for them. Surely it can not be said that there is any implied obligation upon the stockholders to increase this capital unless the directors should so decide. It is not a debt of the stockholder until the directors make it so by deciding to make a call. Did the charter make the whole stock payable at all events, or authorize business to be done on the whole capital stock, the case would be different.

Neither can it be claimed that the directors are in fault for not calling further installments, and therefore ought now to be compelled to call them, or this court will treat them as called. The protection of creditors of the bank, and of the community, is, that the bank liabilities are restricted to three times the amount *actually paid in* on the stock. Suppose additional installments had been called; those installments would stand in security for the additional liabilities of the bank, accruing on her increased means. Creditors are in no way wronged or misled. They might as well claim an equity to have the original capital stock increased, for the payment of their claims, because the original means are exhausted. We may concede that the effects of a corporation, and the installments *actually due* on its stock, are a trust fund for the benefit of its creditors; and the concession would not affect the

present case. Here the business is limited to the installments paid, and the dividends were made, not on the original amount of the stock, but on the installments actually paid thereon.

The lapse of time is another reason why installments can not now be called on the stock, even if they were ever collectable. The bank ceased all business about 1820 or 1821. Only twenty dollars on a share was ever called by the directors; this bill was filed, so far as relates to the present questions, March 26, 1832, ten or twelve years after the bank was broken up; indeed, near fourteen years after she stopped specie payments. In the mean time, as the record shows, many of the stockholders are dead, doubtless a large portion of them are insolvent, many left the state; of course, a call of installments now would operate most unjustly. Probably not one in twenty could be compelled to pay. The charter contemplates equal assessments on the stock; and no assessment could be equitable which was not equal. Circumstances are so changed by the lapse of time (they must be in the ordinary course of human events), that no assessment now can 70] *operate equally. The modes provided by the charter for enforcing payments of installments have become entirely nugatory; those who should be compelled to pay have lost all means of being remunerated from others, or of deriving any of the benefits secured to them under the charter. The State of Ohio itself is a large stockholder; whether she would be called on for her installments is, perhaps, doubtful. The charter makes them payable in the first instance out of the dividends; and if they are payable only in that way, the insolvency of the bank has entirely destroyed the equality between her and other stockholders, in case of a new assessment on the stock.

On this point, it is not necessary to cite the law on the effect of delay and lapse of time. Equity aids only the diligent, and especially it gives *extraordinary* remedies only to clear equity and prompt claim. It is now at least nineteen years since the complainants' claim must have originated.

Another point made in some of the answers, though not touched in argument by complainants' counsel, is the statute of limitations. Whether it is now to be considered by the court, I do not know. We insist that it is a bar of any claim for installments on stock. If any such can be called, it is by virtue of an implied contract by the stockholders, and of course is barred by the statute. Perhaps

a decision of this point, as applicable to the case, may involve too much of fact to be now decided. It may turn on the special circumstances of each defendant who may set it up.

Another question will arise, though perhaps not as a subject of much controversy, whether stockholders can be reached, if at all, until after the debts due to the bank are exhausted. A large amount of debts appear to be due to the bank, but whether solvent or insolvent does not appear.

S. P. CHASE submitted a separate argument for respondent, Stone.

Judge WOOD delivered the opinion of the court:

Upon the facts as stated, in this case, the counsel for the complainants present four distinct points for consideration and decision.

1. Are the original subscribers to the stock of this bank, who still continue stockholders, now liable to be made pay up their stock to create a fund for the payment of its debts?

In equity, it is an established rule that the stock of a trading *corporation is a pledge for the payment of its debts. Upon [71 this stock it originally obtains credit. It is the duty of its managers to see that the stock is contributed, and it is not less the duty of the subscribers punctually to contribute it when required to do so. If not thus contributed, equity may compel it to be done, in a proper case, and where good faith requires it. While in full life, the court would operate upon its corporate faculty. The abandonment of its duties, by that faculty, can not defeat the rights of third persons. Under our statute, we believe that equity, in behalf of a judgment creditor, may invest him with all the rights to act, in settling the concerns of the bank, and one of these might be to compel a contribution of unpaid stock. But this must depend upon all the particular circumstances of the case.

2. The second point raises the question: In a bill like this, can original stockholders, who have *bona fide* transferred their stock, when they had paid up all the calls made, be called upon to contribute the unpaid proportion, for the satisfaction of creditors? We have come to the conclusion that such contribution can not be exacted. The right of *bona fide* transfer is secured by the terms of the charter. It relates to the honest conditions of the parties at the time of the transfer. When this transfer is fairly made,

new certificates generally issue, and the stock assumes a new character as to the ownership. The new owners incur the responsibilities of their position, and those who honestly make the transfers are discharged. But the transferees succeed to all the legal responsibilities of the original parties from whom they purchased, and nothing more. The extent of these responsibilities is usually settled at the time of transfer. If not then adjusted, the liabilities of those implicated may depend upon circumstances.

In the view we take of the case before us, it was not absolutely necessary that we should have gone as far as we have, in deciding the two points disposed of; but, in doing so, we think we may make our final decision more clear and comprehensible.

3. The third point involves the liabilities of assignees of stock. This, we have said, depends upon facts connected with the transfer.

4. The fourth point covers not only the case of stockholders, but that of debtors also. The respondents insist that the lapse of time and change of circumstances forbid that any of these should be subjected in this case. And in this position we concur. In relation to the stock of this bank, to the debts due it and due from it, all values have changed, while the complainants have been sleeping over, or creeping on in the pursuit of their rights. Changes 72] *of this kind have rendered it impracticable to do anything like equity among all who may possibly be affected. The case has become stale and is not to be favored. Clark v. Bond, S. C. 282; 1 Mad. Ch. 15, etc.; 1 Ohio, 22, 532; Story's Equity, Com. 785. In fact, all the cases concur that time may become decisive of a party's rights in a case like the present.

Bill dismissed, as to certain defendants; retained as to others.

Mary Glenn v. Bank of the United States.

A feme covert's execution of a deed, in conjunction with the attorney in fact of her husband, is valid and obligatory upon her.

This cause was adjourned from the county of Hamilton.

The case made by the bill, answer, and exhibits is this: Hugh

Glenn, in his lifetime, by power of attorney, duly executed, and dated September 15, 1820, authorized his brother, James Glenn, for him and in his name, to make sales of his estate, real, personal, or mixed, and to execute good and sufficient writings and deeds therefor. Under this power, and in pursuance of the authority conferred by it, James Glenn conveyed the premises, of which the petitioner now seeks to be endowed, to the Bank of Cincinnati, and *the petitioner joined in the conveyance, and relinquished dower in the usual form.* There is no defect in the execution or acknowledgment of the deed. The premises were subsequently conveyed, by an unquestioned deed, by the Bank of Cincinnati, to the present defendants.

V. WORTHINGTON, for complainant:

By the laws in force when this deed was executed, there were but two ways by which the estates of *femes covert* could be conveyed or incumbered. The one was by deed in writing, signed and sealed by the husband and wife, acknowledged by them in the presence of two subscribing witnesses, and also before a judge of the common pleas or a justice of the peace. 16 Ohio Stat. 253, sec. 2; 2 Chase's Stat. 1041. The other was by a power of attorney executed by the wife, in conjunction with her husband, in which she relinquished her estate or right of dower, and the title made under such power must include her name, and shall be valid in law to divest her of her estate or right of dower in the lands *conveyed by virtue thereof. 16 Ohio Stat. 155, sec. 6; [73 2 Chase's Stat. 1042.

This conveyance does not come within the first mode, because the husband does not sign and seal the deed with the complainant, unless it be that the action of the husband, by his agent, meets the requisitions of the law; which leads us to an examination of the powers of that agent, their extent and object, as well as the scope and design of the laws then in force upon this subject.

It is not denied but that the husband could constitute an agent to convey his estate under the laws then in force; but it is denied that he could constitute such an agent, whose conjunction with his wife would authorize the conveyance of her estate, because the law did not contemplate or provide for such a mode of conveyance. It can not be pretended that the husband, much less the wife, could pass the legal title of landed estates otherwise than

according to the statute. By whatever modes legal estates may be transmitted elsewhere, it is certain they can not be transmitted here, except under the forms and solemnities pointed out by statute. The legal title must pass according to law, or not at all.

The power conferred upon James Glenn, by the warrant of attorney, authorized him to convey the lands of Hugh Glenn, and not those of his wife, the complainant. The extent of the power is to control his own lands, his own estate therein, and not that of his wife. If this be the power, is it not manifest that Hugh Glenn did not authorize, by that warrant of attorney, the conveyance of his wife's estate? The power might extend to his own estate in lands belonging to his wife, but it did not extend to her rights, either in his own lands or those belonging to her in her own right. When, therefore, the agent, by the conjunction of the wife, attempted to convey her estate, he transcended his authority. If it be possible for the wife to pass her estate by a deed, executed in conjunction with an agent of her husband authorized to convey his (*not her*) estate, it would seem to follow that the wife might execute a separate deed and attain the same end, when her husband had previously, or subsequently should execute a deed to the same grantee; because the consent, concurrence, or conjunction of action required by the statute, upon the part of the husband and wife, exists as fully in the one case as in the other. In neither is there any privity between the husband and wife, as to the rights of the wife, but their action is separate and distinct. The warrant of attorney sanctioned the grant of the husband's rights; it did not authorize the agent to act in behalf of the hus-
74] band upon *the rights of the wife, even if such a thing would have been sanctioned by the law. If I be right in this construction of the power conferred by the warrant of attorney to James Glenn, it follows that the complainant is not precluded by the deed of September 9, 1820; because, as to her estate, the agent had no power to act for the husband, and his concurrence in her act, according to the law, does not take place.

The object of the law, if I comprehend it correctly, was in every conveyance of the wife's estate to obtain the united and concurrent action of the husband and wife, as well as the free will and consent of the latter. It, therefore, requires the joint personal action of the husband and wife, as well as the separate action of the wife, on a private examination, to prevent coercion. The statute

requires, in express terms, the husband and wife to sign and seal the deed intended to pass the estate of the wife. This is a personal action in which they must join. If it be a matter in which they can not join, section 6 of the act (2 Chase's Stat. 1042), comes in and points out a mode for an agency through which they may act. This provision conduces to carry to my mind full conviction that the lawgiver intended that the deed to pass the estate under section 2 (2 Chase's Stat. 1041), should be executed in person by the husband and wife. If this view of the subject be correct, it follows that this deed was not executed in conformity with the statute then in force; because the husband did not join in the deed with the wife. He did not join personally either in the deed or warrant of attorney, nor by his agent, even if the law tolerated that mode of passing the estate of the wife.

Nor did this conveyance come within the other mode pointed out by the statute, because the wife did not join in the warrant of attorney to James Glenn; and if she had joined, it would have been of no avail, as it did not authorize the passing of her estate.

These were then the only modes known to our law, whereby the estate of a *feme covert* could be conveyed; and this deed not being executed in conformity with either mode, does not preclude the complainant from advancing her claim to dower.

It is, probably, unnecessary to refer to cases to guide us in the construction of this statute; but, if it be necessary, it is believed the following cases are somewhat analogous to the one now under consideration: 6 Wend. 1; 3 Paige, 483; 3 Mason, 347; 8 Conn. 544; 3 Dana, 319. In the case of Gillespie's Lessee *v.* Wiggins and Johnson, *Wright, 231, the construction of this statute [75 came up before this court, though not in the precise aspect it now does, where it was held that a *feme covert* could only convey her estate in conjunction with her husband; they must both sign and seal the same deed. That case was this: One Foster conveyed to Hargraves a lot, in Cincinnati, belonging to his wife. Hargraves ascertaining the title was in Mrs. Foster, obtained from her a deed executed by her alone, reciting the deed executed by her husband; and it was held the wife was not barred, because the husband did not join with her in the deed. In the case of McFarland *v.* Febiger, 7 Ohio, part 1, 194, I understand the court to decide the law as I claim it to be settled.

N. WRIGHT, for defendant:

The right of dower depends on the legal effect of the power of attorney from Hugh Glenn, husband of the petitioner, to James Glenn, dated April 15, 1820, and the deed made by the attorney for Hugh Glenn, and the complainant, Mary Glenn, in person, dated September 9, 1820.

The complainant contends that she has not barred herself of dower by joining *in person*, in a deed which her husband executed *by attorney*.

For the defendant, we contend that such an execution bars dower.

The power of attorney was executed under the statute of January 30, 1818, 2 Chase's Stat. 1041; and the deed under the statute of February 24, 1820. 2 Chase's Stat. 1139.

On common law principles a man may make a deed by attorney, as well as in person; it is an act which *of course* may be done by attorney, and in legislation, as well as in pleading, his deed made by attorney is spoken of as *his deed*, no distinction being made between the two modes of execution. Of course, when our statute provides that a man may convey lands by deed so and so executed, it includes execution by attorney, as well as in person. No special statute is necessary to authorize the execution by attorney. This principle, therefore, may be taken as settled, that the statute providing how deeds shall be executed, includes, *in the same general language*, executions *in person and by attorney*.

This principle probably does not apply to an execution by a married woman, because her power to convey is purely statutory, 76] *and when the statute empowers her to convey by joining in a deed with a particular acknowledgment, there is no power given to make such acknowledgment to a warrant of attorney.

Again, there are some other familiar principles, which must be kept in mind. Our statute first authorized a married woman to convey by joining her husband *in a deed*. Afterward a provision was introduced, authorizing her to convey by joining her husband *in a power of attorney*. Now it is evident that this last provision was intended merely as an *additional facility*, not intended to restrict or limit the power of conveying in any other form; but adding to the facilities of conveying already provided. *Before*, she could convey by joining in a deed; *now*, she can also do it by joining in the power of attorney.

Putting together the two principles above stated, what will be

the result? *Before* the provision for the power of attorney, the general language of the statute, authorizing a deed by husband and wife, would include deed by attorney as well as in person; and of course authorized a deed like the present, where the husband joins by attorney and the wife in person. The subsequent provision for a power of attorney for the wife, does not limit, but extends, this remedy; of course, the same construction must now be given to the same language, and the deed in question is a valid bar of dower.

It has been argued that the statute intended to secure to the wife the protection of the presence and personal advice of the husband in the act of executing the deed, or power of attorney, and therefore must be construed as not authorizing any other execution than where they are both personally present.

The statute does perhaps intend to protect the wife from imposition or persuasion, by requiring the husband to join, thereby giving his sanction to the deed. But that is all it requires. When a deed is drawn for the husband and wife, and is signed by the husband, that signature is the best proof that the wife can have of the approbation of the husband. Will any court sanction the principle, that the husband, after he had signed such a deed, thereby in the most solemn manner sanctioning it, should be encouraged to turn round and secretly dissuade his wife from signing it? Surely not. Yet such must be the result of this principle, as contended for on the other side. The statute requires the signature of the husband, thereby insuring his sanction of the conveyance, but could not insure any other kind of sanction without opening the door for private tampering against his own *solemn pledge to [77 others. It could not, therefore, have intended any more than what it says; that is, that the husband shall join in the deed, but after that, leaving the wife to herself, whether she should sign or not.

The language of the statutes corresponds with our views of the case.

The statute of February 14, 1805 (1 Chase's Stat. 484, sec. 2), provides that husband and wife may execute deeds, and if she acknowledge, etc., on a *separate examination*, the deed is as valid as if she had been *sole*. The statute has no reference to power of attorney. It says nothing about a joint personal acknowledgment or the actual presence of both; on the contrary, requires a *separate* examination of the wife.

It seems to me no one could doubt, that under this statute the husband might join by attorney, and the wife in person, to bar her right.

The next statute is that of January 20, 1818. 2 Chase's Stat. 1041. Section 2 contains substantially the same provisions as the former.

The language of section 1, providing for deeds by others than married women, is the same as section 2; and, if under section 1 a deed made by attorney would be included, it must follow that a deed of the husband, by attorney, would be embraced in the language of section 2.

This statute (section 6) first provides for a power of attorney by the wife. This provision is clearly intended to *extend* the powers of the wife, not to take away any already given. The language is, "it shall be *competent* for the wife," etc. It clearly intends to point out a mode by which the wife may make an attorney, and the form of the deed by her attorney. It has no reference to anything but the joint power of attorney; and the effect of such deed is to divest her estate "as effectually as if *she had signed* and acknowledged the deed;" plainly indicating that her signature, without reference to the mode in which the husband executes, is a perfect execution.

The power of attorney was made while this statute was in force. By section 5 of the act of February 24, 1820, all instruments, etc., for the conveyance of real estate shall remain as valid as if the act of 1818 had not been repealed. By this act all the original effect of the power of attorney is preserved.

The same general remarks apply to the statute of 1820 as are made above of the statute of 1818.

78] *The evil intended to be remedied by these statutes is to enable the wife, by a simple deed, to convey her estate or bar her dower. The English mode of doing this was by proceeding in court; and the chief object of this proceeding was to ascertain that the wife acted *without the coercion* of the husband—this was the sole object of the examination in court. So in our statutes, it is obvious that the sole object of the restrictions as to execution by the wife, is to guard her against *coercion of the husband.* The statutes are not designed to guard her against influence from any other quarter; for, as to such, a married woman is no more

liable to imposition than a single one. In construing these statutes, therefore, this chief object of them must be kept in view.

It has been common for the husband to execute a deed in one place and the wife in another, making separate acknowledgments to the same deed. These have always been considered valid, for the statute requires a separate examination of the wife, but does not require a joint acknowledgment. If it does, very few of our acknowledgments are legal. Suppose the husband signs and acknowledges the deed at my office; the magistrate then calls at my house, where the wife signs and acknowledges, the husband not being present. This state of facts is consistent with the ordinary form of a magistrate's certificate.

It is held that this certificate must show all that is essential to the legality of the wife's acknowledgment; still perhaps no certificate will be found that is not consistent with the above state of facts; and such certificates have often been recognized in court. If it is not necessary to show that they came *together in person* and acknowledged, I see no reason why the acknowledgment by attorney is not strictly within the statute.

Again, the statute contemplates a separate and independent act of the wife. The object of it is to enable her to act for herself; to express her own free will, as a separate and independent person, in relation to her own individual rights; to give her an individual capacity to act, in disposing of her own rights, which she had not before. In doing this, there was no special occasion to guard her against the frauds of third persons; the guards of the common law are sufficient in this case as well as in the case of an unmarried woman.

GRIMKE, J., delivered the opinion of the court:

The question arising in this case is a new one; but as there are no new principles of law it may not be difficult of solution. At *the time the deed was executed, the statute of January, 1818, [79 was in force. That act prescribes two modes by which a married woman might release her right of dower; one by joining in the conveyance made by her husband; the other by joining in a power of attorney to convey. The conveyance to the bank appears to be illegal, because it does not pursue either of these provisions singly; but if it is a combination of both, it will not, on that account, be less firm and obligatory; on the contrary, the statute will

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be as faithfully complied with as it would have been in the former case, as every statute, at the same time that it professes to ordain a new rule, contains also a recognition of a great variety of old ones, by the assistance of which we are alone able to understand and interpret it; it becomes necessary to look both in and out of the statute whenever any controversy arises demanding a construction of it. A conveyance by a man, by attorney, is itself the creature of the common law; it has not its origin in any statutory provision. Thus any one who had power to convey directly by deed had also power to convey indirectly by attorney. The two modes of conveyance are virtually the same; in both instances, the deed executed is the deed of one and the same person, and the instrumentality of the agent is no further regarded than as he identifies himself with his principal. The statute of 1818, not noticing, but necessarily recognizing these principles, has authorized a married woman to unite in a conveyance made by her husband. Mrs. Glenn has actually made herself a party to a deed, which, in no view you can take of it, can be deemed to be the deed of any other person than her husband; and I do not see but what she is completely and fairly estopped from demanding an assignment of dower. The antiquated mode of barring dower is unknown in Ohio. We have adopted a more simple and enlightened form of proceeding, and it is greatly to the credit of English jurisprudence, that in its numerous efforts of late years to imitate our laws, it has not forgotten this feature of them; a bill having been introduced into parliament authorizing the American mode of conveyance by husband and wife. If it should be said that there is less solemnity attending it than the ceremony of fine, it may at any rate be asserted that it is better adapted to the advanced condition of women at the present day. Our laws are in reality, to a great extent, a transcript of our manners. If women, as well as men, have been lifted to a higher standard than when fines were invented, it is natural that the law, in every arrangement 80] which it makes for the protection of their interests, *should be accommodated to that altered condition; and this affords a very good reason why we should not voluntarily apply any very nice and technical rules in the construction of a statute which is made in furtherance of, rather than in derogation of the rights of married women.

There is no direct authority to be found on either side of the question; but there is a dictum of Parsons, in Fowler v. Shearer,

7 Mass. 21, which is entitled to notice. It says the consent of the husband to the conveyance of the interest of the wife in lands, "must be manifested by his joining in the deed, either in person or by attorney." The case did not demand the determination of this point; however, the dictum of so profound a lawyer, who was not accustomed to hazard any random opinion, is entitled to the greatest attention. It is evident that our law has two ends, apparently diverse and contradictory, in view. One is to protect the wife from the influence and persuasion of her husband; the other, regarding them strictly as but one person, renders it necessary that his consent should be manifested to the conveyance. The first is accomplished by a separate examination of the wife, and the other by making him a necessary party to the deed. The mode of conveyance in this instance does not interfere with the first intention, but rather contributes to further it; nor does it interfere with the second, as it is impossible to imagine a more plain and unequivocal declaration of consent on the part of the husband, when the deed executed by him purports to be a conveyance of the entire interest in the land. If I could suppose a case in which a husband might execute a deed of this nature, and yet at the same time, fairly and without any design to commit a fraud, intend not to convey an absolute interest, I might hesitate; but I can not suppose such a case. I conclude, therefore, that Mrs. Glenn has precluded herself from demanding dower, and that the motion must be granted.

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*Lessee of Moses A. Blackburn v. Benjamin Blackburn. [81

In ejectment, a party may make title under a lost deed that never was recorded. In such case, the facts of existence and loss are preliminary and addressed to the court; the case is then committed to the jury upon the contents, execution, acknowledgment, and delivery.

Motion for a new trial, reserved in the county of Columbiana.

This was an action of ejectment, submitted to a jury in the county of Columbiana. Moses Blackburn, sen., the grandfather of the lessor of the plaintiff, and father of the defendant, was in possession of the premises under a patent from the government, and

continued in possession until the time of his death, when the defendant entered into possession, under the devise of his father, Moses Blackburn, sen. This specific property was not mentioned in the will, but the plaintiff claimed under a residuary clause. On the trial of the cause, parol testimony was offered on the part of the plaintiff to show the execution, acknowledgment, contents, delivery, and loss of a deed alleged to have been made by Moses Blackburn, sen., to Moses Blackburn, jr., the father of the lessor of the plaintiff, in 1821 or 1822, and the parol declarations of Moses Blackburn, sen., respecting such alleged conveyance; which testimony was objected to by the defendant's counsel, but admitted by the court, and a verdict returned for the plaintiff.

The defendant then moved for a new trial, for the following reasons, to wit:

1. Because the court permitted parol testimony to be given to the jury to prove that a deed of the premises in dispute, from Moses Blackburn, sen., to the father of the lessor of the plaintiff, was duly made, executed, and acknowledged, according to the forms of law, without requiring the production of the deed itself, or a certified copy thereof from any record or public office whatever, thereupon to lay the foundation for the admission of its loss, that parol evidence might be given of its contents.

2. Because the court admitted parol proof of the declarations and acknowledgments of Moses Blackburn, sen., under whom the plaintiff claims, going to show, and for the purpose of proving that he had made, executed, and acknowledged a deed of conveyance of the premises in dispute to Moses Blackburn, his son, and the father of the lessor of the plaintiff.

3. Because the case, as presented to the jury, disclosed a body of circumstances only cognizable by a court of equity, and such as ought not to have been submitted to a jury.

4. Because the court instructed the jury that the same evidence that would satisfy the law as to the loss of a bond or other ordinary instrument of writing, that secondary evidence might be
82] given *of its contents, would be sufficient to prove the loss of a deed of conveyance of real estate.

5. Because the verdict was against the law and the evidence.

The cause was argued at length by RUSSELL and MERRICK, for the defendant, and by LOOMIS and METCALF, for the plaintiff.

For the defendant the following authorities were cited: 16 Johns. 305; 2 Conn. 80; 3 Amer. Dig. 340.

For the plaintiff: 3 Ohio, 108; 10 Johns. 374; 11 Ib. 506; 5 Mass. 101; Phil. Ev. 347.

Judge HITCHCOCK delivered the opinion of the court:

On the trial of this case, the lessor of the plaintiff claimed title to the premises in controversy as the heir at law of Moses Blackburn, jr., deceased, and that his ancestor derived his title by deed from Moses Blackburn, sen. The defendant claimed title under the will of Moses Blackburn, deceased, as residuary devisee or legatee. The deed of Moses Blackburn, sen., to Moses jr., was not produced in evidence, nor a copy from any public office. But the existence and execution of such deed, and its loss, were attempted to be proved, for the purpose of laying the foundation for going into secondary evidence of its contents. With this preliminary proof the court were satisfied, and admitted parol evidence to go to the jury to prove the contents of the deed. In this it is supposed by the counsel of the defendant that the court erred, and this error furnishes the ground for the first reason assigned for a new trial.

We are well aware of the necessity which exists, that there should be certainty with respect to land titles; and that the state of these titles may be known, and evidence of them preserved, our law requires that deeds and other instruments of writing, conveying, and incumbering lands should be recorded. The same law prescribes that copies from the records of deeds, mortgages, etc., should be *prima facie* evidence of the existence of such deeds, so that where a deed has been recorded, the party claiming under it is relieved from the necessity of proving its execution, provided he introduce in evidence a copy. 29 Ohio L. 349. The wisdom of this particular provision of law may be questioned; but still, while it continues a part of our system, it must be enforced. The recording of a deed, however, is not necessary to give it validity as between the parties. The title passes, not by the recording, *but by the delivery of a deed. True, if it be not recorded [83 within a limited time, a subsequent grantee without notice, will have the land. This is not, however, because there was anything remaining in the grantor which he could convey, but because the first grantee has been guilty of a culpable neglect, which, upon

any other principle, would operate an injury upon an innocent individual. The title having passed by the delivery of a deed, is not divested by the destruction or loss of that instrument. It still remains in the grantee. How shall he manifest it? Counsel for the defendant answer, by a copy from the recorder's office. It may not have been recorded, or if recorded, the record itself may have been lost or destroyed. As a matter of fact we know that public records are not unfrequently consumed by fire, or otherwise destroyed. When other instruments of writing are lost or destroyed, the law is well established that secondary evidence of their contents shall be received. This is not denied; but it seems to be supposed that there is some peculiar sanctity about conveyances of real estate, which requires a different rule to be established. In the opinion of the court, however, the rule is the same in either case. The court must be first satisfied of the existence, execution, and loss of the instrument. No particular kind or description of testimony need be introduced to produce this effect, but it must be such as produces conviction in the mind of the triers. The case of Lessee of Allen *v.* Parish, 3 Ohio, 107, is an authority upon this point.

It is urged further by counsel for defendants, that by receiving parol evidence, to prove the contents of a deed, the statute of frauds is violated, or at least evaded. But in this, it seems to the court, counsel are mistaken. Section 4 of this statute, 29 Ohio L. 218, provides that no interest in land shall be assigned or granted, unless it be by deed, or note in writing, etc. If the proposition in this case had been to prove a parol grant of the premises in controversy, it would have been within the statute. But it was not so. The proposition was to prove that a grant had been made in writing, and in conformity with the law regulating the conveyance of real estate. True, the instrument of writing evincing this grant was not produced; nor could it be, because it was lost, and from necessity parol evidence was admitted to prove, not a *parol* conveyance, but a conveyance in writing.

It has been further objected in argument, that by adhering to the principle decided upon the circuit there is danger of opening a wide door to perjury. The force of this objection is felt by
84] *the court; we always regret to be under the necessity of receiving parol evidence of any written instrument, and not unfrequently, in such cases, entertain suspicions that the party

claiming under such proof, establishes a more favorable case than he would were the instrument itself produced. But it is not within our province to disregard a rule of law, because, by possibility, it may be abused. All we can do is to guard as far as possible against such abuses.

The second reason assigned for a new trial is that "the court admitted parol evidence of the declaration and acknowledgments of Moses Blackburn, sen., under whom the plaintiff claims," etc.

The declarations of Moses Blackburn, sen., which were objected to, but received in evidence, were such generally as were made in connection with the execution of the deed. Declarations were made while going to the magistrate to perfect the acknowledgment, and at the time of the delivery. They were in fact a part of the *res gestæ*, and as such properly received. True, there were some declarations testified to, which were made after the deed was delivered, but they were principally such as were drawn out on the cross-examination of witnesses, and were received by way of explanation, rather than as sustaining any particular fact in the case. There might, by possibility, have been some things which were not strictly proper, and we all know how difficult it is, in the course of the examination of a witness, to restrain him within strict technical limits. But were we to grant new trials because a witness might have uttered an improper word or sentence, there would be no end to litigation. In every case, it is true, where improper evidence has been admitted, and of that character which might, by possibility, have influenced the jury, a new trial should be granted. But in this case there was nothing of this kind, and it is believed that had the declaration of Moses Blackburn, sen., been entirely excluded, the verdict of the jury could not have been changed.

The third cause assigned for a new trial is, that "the case presented to the jury, disclosed a body of circumstances, only cognizable by a court of equity, and such as ought not to have been submitted to a jury."

There can be no doubt, I apprehend, that the facts disclosed in this case were such as would be cognizable by a court of chancery. But it does not follow that they are alone cognizable in an equitable tribunal. This must depend upon the rules of evidence. I understand these rules to be the same in chancery as at law, so *far as the facts of this case are concerned. In neither court [85

can the contents of a writing be proved by secondary evidence, until the fact of its loss is established. Nor is any less evidence necessary to establish the fact of loss in the one court than the other. In either, it must be such as to produce conviction. In this case the lessor of the plaintiff was claiming under a purely legal title. He was pursuing the appropriate legal remedy, and in pursuing this remedy he introduced strictly legal testimony. It is argued by counsel, however, that by accepting this mode of proceeding, the legality of a written instrument is in effect submitted to a jury, whereas to adjudicate upon such a subject is peculiarly within the power of the court. We recognize the doctrine that questions of law are for the sole consideration of a court, and where an instrument of writing is introduced in evidence, its proper construction is a question of law. If it be such an instrument as is required by the law to be executed with particular formalities, whether it has been so executed, must be adjudged by the court upon inspection. The same rule applies where the instrument is lost. The jury find the contents, and the court determine from the facts thus found, whether the instrument was in conformity with the law. In the case under consideration, the jury were informed what was necessary to constitute a good and valid deed of conveyance, and by their verdict they found that such an instrument had been executed.

If the instruction complained of in the fourth reason assigned for a new trial was given, we discover in it nothing erroneous. As has been already observed, no specific evidence is necessary to prove the loss of a written instrument. It must be such as to satisfy the conscience of the tribunal to which it is directed; and it is impossible to conceive, that evidence which would satisfy the mind that a bond conditioned for the payment of money was lost would not, if applicable to a deed for the conveyance of land, satisfy the same mind of its loss.

The last reason assigned for a new trial is, that the verdict was against the law and the evidence. If the court are correct in what has been already said, the verdict was not against law. Was it against the evidence?

The facts proven were these: At the time of the execution, or pretended execution of the deed for the premises in controversy, Moses Blackburn, sen., being advanced in life, and somewhat, although not greatly in debt, proposed to his sons to convey to

*them a part of his property, they assisting to pay his debts, [86
or one particular debt. For the purpose of designating boundaries, the land was surveyed into several parcels, and one of the sons employed to write the deeds of conveyance. They were written and left in the possession of Moses, sen. The deed to Moses, jr., who was one of the sons, covered the lands in controversy. After a considerable lapse of time, the old gentleman went to a magistrate and executed and acknowledged these deeds, but did not immediately deliver them. At length, however, his sons came together at his house, paid him the money stipulated, and he delivered to them their respective deeds. After the delivery, and after considerable conversation between the respective parties, Moses, jr., handed back his deed to his father, to be by him kept as surety that Moses would support him, from the place, during his (the father's) life. The deed was handed by the father to one of his daughters for safe keeping, and she held it until finally it was lost. Not many months after this, Moses, jr., died, and the old gentleman continued to occupy the place until his decease, deriving in a great measure his support therefrom. Two of these deeds were before the jury, and the grantees testified that the deed to Moses, jr., was in the same words, and executed and acknowledged in the same manner, except that it covered a different piece of land. The subscribing witnesses were also examined, and the testimony of one of them was such as to lead the mind to the conclusion that a deed had been executed, as claimed by the lessor of the plaintiff. In addition to this a paper was introduced, sworn to be an exact copy of the deed to Moses, jr., with the exception of the signature, attestation, and acknowledgment. This was the original draft of the deed, but was not executed on account of some interlineations.

With this proof before the jury, there can be no pretense for saying that the verdict was against the evidence.

The motion for a new trial is overruled, and judgment will be entered on the verdict.

87] *DOE, LESSEE OF FOSTER ET AL. v. EXECUTORS OF THOMAS DUGAN.

Irregularities in proceedings for partition do not affect titles conveyed by the sheriff, acting under the order of the court, as commissioner to make deed of partition.

Entries made on the margin of the record book, by the recorder, not part of the original papers, do not affect the title.

THIS was an action of ejectment, reserved in the county of Hamilton.

The facts were presented in an agreed case.

The plaintiffs seek to recover an undivided half of lot No. 92, in Cincinnati. In 1805, William Woodward was the proprietor, in his own right, of three undivided eighths of the lot, together with an out-lot, and held one undivided eighth in right of his wife. The remaining four-eighths were respectively owned by Seth Cutter, Abigail Pillsbury (wife of Silas Pillsbury), Mary Cutter, and Hephzibah Foster (wife of Samuel Foster). In August term of the common pleas of Hamilton county, a petition for partition was filed, as follows:

"The petition of the subscribers respectfully showeth, that John Cutter, late of Cincinnati, died seized of a certain in-lot, No. 92, containing seventy-two perches; and one out-lot, No. 20, containing four acres, situate in the town of Cincinnati, held by purchase from and under the proprietors of the town; in which lots, William Woodward is entitled to three-eighth parts; Abigail, wife of said William, of one-eighth part; Hephzibah Foster and Seth Cutter, both of the town of Cincinnati, are each entitled to one-eighth part; Abigail *Pillsby* and Mary Cutter, both of Massachusetts, are entitled to one-eighth part; for which petitioners ask partition, etc.

"WILLIAM WOODWARD,
ABIGAIL WOODWARD,
SAMUEL FOSTER,
HEHPZIBAH FOSTER,
SAMUEL FOSTER, *Att'y for Mary Cutter.*"

On the journal of August 14th is entered, "The petition of Woodward, Foster, etc., for partition, to be advertised three weeks in the papers, as the law directs."

The record shows, that in December, 1805, an order for partition was issued to the sheriff, which was returned, with a report by the commissioners, showing that they were sworn; that in their opinion the land could not be divided without injury; and that *they appraised the in-lot at seven hundred dollars and [88 the out-lot at one hundred dollars. The court thereupon accepted the report, and allowed William Woodward and Samuel Foster to take the property jointly between them at the valuation.

On September 12, 1806, a deed was made by William McFarland, sheriff of Hamilton county, which was recorded December 5, 1806, which, after reciting the original title, the petition, proceedings, and return, continues, "And the said Samuel Foster, being lawfully seized of one-eighth part or share of said two lots, by intermarriage with Hephzibah Cutter, daughter of the above-named John Cutter, did take and purchase the shares of Seth Cutter, Abigail Cutter, and Mary Cutter, being three shares of one-eighth part of said lots, each, for the proportion of the valuation of said lots, as returned, etc.; therefore, for the consideration of three hundred dollars, paid and secured to the satisfaction of three of the above-named" heirs of John Cutter, etc., proceeds to convey "one equal undivided half." The acknowledgment of this deed, which was made on November 6, 1806, professes to be by William McFarland, *late* sheriff, etc. On the margin of the record of this deed the recorder entered the following memorandum: "This deed was drawn by the recorder, and executed in his presence by the sheriff. It was left in the office of the sheriff, subject to some arrangements with the grantee, but not delivered to him afterward; by an error entered on record, by the recorder, J. W. Browne."

It was shown, by proof, that Abigail Cutter, one of the heirs of John Cutter, was married to Silas Pillsbury, at the time of filing the petition, and that Hephzibah Foster was living at the time of filing, but died before any proceedings.

V. WORTHINGTON, for plaintiffs:

The case made authorizes a recovery for the plaintiff's lessors, unless they are precluded from asserting title to the premises claimed in consequence of the proceedings in partition offered by the defendants; and that they are not precluded is apparent for the following reasons: 1. Neither Hephzibah Foster nor her children were parties to the suit, while pending, under which it is alleged the partition was made. 2. The proceedings in partition

have not been perfected so as to divest the legal title. 3. Admitting the proceedings in partition can not now be impeached collaterally, so far as they go, yet they do not pass the estate Samuel Foster held by courtesy, in right of his wife, from her or her 89] *heirs. 4. The election made by Samuel Foster in right of his wife, and his possession under that election, inures, not to his own right, but to the right of his wife or those claiming under her, notwithstanding there has not been an order for a deed nor one executed.

1. Neither Mrs. Foster, nor her heirs, were parties to the suit while pending, under which it is alleged the partition was made, and through which the defendants deduce their title. Upon this point we understand the facts to be, that Mrs. Foster, with her husband, in August, 1805, signed the petition. In the August term, 1805, of Hamilton common pleas, it was filed; no service being had, publication was ordered for three weeks. There is no evidence that such publication was made. Neither the record, minutes, nor original papers on file, show when publication was made, or that it was made at all. We are aware that a record imports absolute verity and can not be impeached collaterally. 1 Chit. Pl. 262; 3 Thomas' Coke, 323. But this rule is applicable only to that which appears of record. 1 Ld. Raym, 151. And our own courts now hold, 7 Ohio, 258, where a material fact is shown to have existed by the papers on file, or entries on the minutes, the omission of the clerk to include such fact in the record, can not prejudice any one further than to put him to the inconvenience of hunting up the proofs. So that, that which does not appear of record, is nevertheless admissible to aid it, if it appear from the minutes of the court, or from the filed papers, and not otherwise. Taking, then, this rule for our guide, we claim from the testimony in the cause, that Mrs. Hephzibah Foster died before the partition suit was pending, or in legal contemplation had a beginning; and having so died, the subsequent institution and continuance of the suit in her name in part, without making her heirs parties thereto, can not make that suit obligatory on them, or estop them from asserting title against it. In Ohio, a suit is not begun or pending till service of process or publication perfected for the full time. 3 Ohio, 541; 5 Ohio, 462. Had the suit been pending at the time of Mrs. Foster's death, then her death would have abated the suit; but in order to constitute an abate-

ment, the suit must be pending and the death ensue or happen prior to judgment. 1 Paine, 483. For present purposes we may concede that the death of a party to a suit pending, does not vitiate the subsequent proceedings so as to avoid them absolutely; but they are avoidable, and will be reversed on a writ of error. 4 Cowen, 458; 10 *Mass. 5; 5 Day, 527; Croke Eliz. 106, [90 199; 2 Tidd's Prac. 1225, 1191; 3 Salk. 145; 2 Selw. Prac. 399. Yet we claim the consequences are wholly different where a death happens before the suit is pending. There can be no such thing as an abatement of a suit until it has existed. The death of a party named in any judicial proceedings before they are instituted, wholly impairs their effect and operation against the decedent; and what might be done in such a case would be *res inter alios acta*, and not obligatory.

2. In the next place, we claim the proceedings in partition have not been perfected so as to pass the legal title. The proceedings in this case were not in chancery, but under the act to provide for the partition of real estates of 1804, according to the test established by this court in Doane *v.* Fleming et al., Wright's C. C. 168. Independent of that test, we maintain that our courts, in 1805, had no chancery powers in matters of partition. The constitution of Ohio declares that the judiciary shall have such common law and chancery powers as shall be given from time to time by statute. Const. of Ohio, art. 3, secs. 2, 3. The act of 1804 (1 Chase's Stat. 404, sec. 9) repeals all laws and parts of laws for the partition of real estate, in force at the time of the passage of that act; and of course there could be no mode of aparting estates held in common except *in pais*, or under the statute. Considering this proposition as established, at least so far as the present controversy is concerned, we maintain the court had no power to act, and its action upon the case made is a nullity, because the case does not show that the essential requisites of the law were complied with. The law required the petition to set forth (1 Chase's Stat. 402, sec. 2) the name and place of residence of each co-tenant with the demandant, if known. It is also an established principle, that during coverture, the husband is seized of the lands of the wife in her right, and must be joined with her in all actions relative to the same. In this case, *Silas Pillsbury*, and *Abigail*, his wife, were co-tenants, but not parties to the partition; nor is it averred they were un-

known to the demandants. It is true *Abigail Pilsby* is said to be co-tenant, but that does not cure the omission or meet the demands and objects of the law; because *Abigail Pillsbury*, the wife of *Silas*, was the co-tenant, and not *Abigail Pilsby*, the person named in the petition. We suppose the legislature designed something by the provisions of this act; and a compliance with these provisions to be essential, before any one inter-
91] ested, *could be divested of his rights. Private property, by the laws of Ohio, is held inviolate, subservient only to the public welfare upon compensation made in money, Const. of Ohio, sec. 4, art. 8, and the transfer of individual property can not be accomplished except by consent, or in consequence of the violation or omission of some duty made obligatory by the law, 7 Ohio, 221; and only in the modes known to the law. The requisites of the partition law are as essential to the transmission of the legal title as the requisites of the law relative to the execution of deeds, and must, in each case, be as fully met and complied with. Any other determination would be derogatory to our jurisprudence and a practical commentary upon the frailty of man. Modes of conveyance, whether *in pais* or by judicial sanctions, are but matters of form, and must be pursued, or the whole will be an idle ceremony. No deed is valid in Ohio to pass the legal title unless attested by two witnesses. Why? Because the law requires it. So in a partition, the law requires the co-tenants to be named, and, if not named, the proceedings are insufficient to pass the legal title, because the law has not been fulfilled. The law also demanded forty days' notice to be given, by personal service or publication, before the next ensuing term. In this case the record shows no service, and none can be presumed against the record, minutes, and original files in the cause, as they import absolute verity. Section 3 of the partition act, 1 Chase's Stat. 403, authorizes the court to act upon a petition framed according to the provisions of section 2, upon due notice given. These requisites not being complied with, the action of the court was *coram non judice*, and void. Its power to act under the partition law was special, and to be exercised only in the case given. It is no answer to say the court had jurisdiction of the subject matter, and its decision was subject to revision. The partition act does not provide for the revision of the judgments of the court by error or otherwise, 1 Chase's Stat. 402; nor do the general laws

in relation to writs of error and appeals. Wright's C. C. 168; 29 Ohio Stat. 79, sec. 108; 1 Chase's Stat. 356, sec. 5; Ib. 413, sec. 3, 7. So this court have repeatedly held in relation to appeals. Wright's C. C. 168. And the statutes, it will be found, in relation to this matter, are the same as to appeals, writs of error, and *certiorari*.

But again, where the property can not be divided, and is appraised, one or more of the parties may elect to take the same at *the appraisement. (This is the right of each co-tenant, and [92 how can it be exercised unless each and all are made parties?) And when so elected, the same shall be adjudged to him or them, and the sheriff shall, according to *the order* of court, make and execute conveyances to the party or parties electing to take the same. 1 Chase's Stat. 403, sec. 5. As we understand and construe this statute, it is necessary for the court, after an election is made, to adjudge the property to the party electing to take the same, and order the sheriff to convey the same to him by deed. In truth, there must be a final decretal order, substantially fulfilling the provisions of the law. So it is held in Massachusetts, 7 Pick. 215, under their partition laws; and no good reason can be assigned why it should not be necessary here, more especially as the law seems to demand it.

In this case there was a confirmation of the election, but no order to the sheriff to execute the deed, and, in fact, none has ever been executed by *the sheriff*. The deed offered in evidence was not executed by the sheriff, but by the *late sheriff*. The fact that the sheriff *in office* did not execute a deed, coupled with the other fact that no order for a deed appears of record, is conclusive that no such order was made. Indeed, as the record is silent upon such order, it is conclusive none was made. 3 Ohio, 577; 4 Ib. 129; 5 Ib. 447; 6 Ib. 11. Without such an order, it is manifest no deed could be made to pass the legal title. 5 Ohio, 447; 7 Ib. 11, 264; 1 Ib. 278. No legal estate in lands can be transmitted except by deed duly executed according to the statute; for the transmission of lands by descent, devise, or deed is regulated exclusively by our own statutes. 7 Ohio, 275. In this case the law required the deed to be executed under an order of court by the sheriff, and acknowledged in open court, 1 Chase's Stat. 404, sec. 5; and not by a *late* or *prospective* sheriff, and acknowledged out of court, as the deed offered actually was. We are aware that deeds under executions at law were

to be acknowledged as in other cases, because the law so directed, 3 Ohio Stat. 74; 1 Chase's Stat. 317, 460; and that where a levy was made, or a writ had begun to be executed, the officer beginning it must complete it, because the writ was an entirety. This is the common law doctrine, and was the practice in Ohio up to the taking effect of the act of February 25, 1824, which altered the law in this respect. 22 Ohio Stat. 201, sec. 8; 1 Ohio, 465, 466; 2 Ib. 290; 4 Ib. 56; 2 Saund. 101; Croke 93] Eliz. 397. But it is apprehended that the law in *relation to executions does not furnish the rule of action in cases of partition; on the contrary, we suppose a case of partition under a statute, is to be governed exclusively by the provisions of the act authorizing the thing to be done. The tenure by which real property is held, is too important, and its stability of too much moment to mankind, to be subjected to so much flexibility and uncertainty. The laws regulating judgments and executions constitute one system, and the laws regulating partitions of lands another. Each forms a separate legal department, to be governed by rules applicable to its own class, and not by rules applicable to each other. In this case, the law required the deed to be executed by the sheriff, that is, the *sheriff in office* at the time the deed *is* executed. Where no one elects, the court may direct the sheriff *who held the inquest*, or his successor, to sell, etc. Chase's Stat 404, sec. 5. This difference in phraseology in the same section of the same act, in reference to different objects, clearly demonstrates to my mind, that the legislature intended, in the one case, the order to be executed by the *sheriff in office*, but left the other to the entire direction of the court.

But again, is the deed now offered duly executed? The statute authorizes the sheriff to execute conveyance under orders of court, but is silent as to the mode of execution or acknowledgment. When a sale is made by a sheriff, the deed is to be acknowledged in open court, and we maintain it must be so acknowledged, under an election of one or more of the parties. The statute is competent to the ends designed, and furnishes all the requisites essential to a partition, or the transmission of the title to the party electing to take, or purchasing, in case partition can not be made, and does not invoke or require the aid of any other act, general or special. Its provisions alone must be pursued. What the act does require, must be done to perfect the title; and what it does

not require, if done, gives no aid to the title. But waiving all this, we may still ask, is the deed duly executed? From the acknowledgment certified, it seems Williams McFarland, *late sheriff*, acknowledged the deed to be his act, and not his official act, as sheriff. Should it not appear, admitting a *late sheriff* can execute a partition deed in a case like this, that what was done by Mr. McFarland, was done *ex virtute officii*, as sheriff, and not in his own right, and as his own act. We think so, and believe we are sustained by the case in Ohio, 390. Though the deed be duly executed, still it is claimed the evidence adduced does not establish *the delivery* of the deed. The record *of a deed *per se*, we [94 admit, has been held by this court as *prima facie* establishing a delivery; but such a record we maintain is a fair *bona fide* record, made in good faith, without error, accident, or mistake.

The evidence before the court, if competent, goes to show the deed was not delivered to Browne for record, but as on escrow to be delivered upon a future event, and that it got on record by an error of the recorder. We are aware that the testimony adduced to establish these facts, will be held by our adversaries to be incompetent. We maintain it to be, if competent, *ex necessitate rei*. The deed having been recorded erroneously, it was proper for the recorder to state the fact upon the record and not mutilate his book. Such a certificate, or statement, is within the scope of an officer's power and is proper, and on his death would be evidence of the fact, precisely as a notary's entries after his death are evidence. They are official acts done under the sanctity of an oath, and entitled to some weight. The recorder states upon the record: "This deed is recorded through my error; it was not delivered to me for record, and should not have been recorded." The deed had improperly got upon the record, and could not be got off. The new mode of "expunging" an entry upon a record book was not then in vogue. The star of Missouri had not then arisen above the horizon to shed abroad this *new light of glory;* and the recorder, poor ignorant man, knew no other way to remedy his blunder than to confess it, and brand it as spurious. This we consider he effectually did by the indorsement on the record, which, we claim, he was empowered to make by virtue of his office.

3. Though the proceedings in partition can not be impeached collaterally, yet they do not pass the estate that Samuel Foster

held by courtesy in right of his wife from her or her heirs. The proceedings show that Woodward held three eighths in his own right, one eighth in right of his wife, and that Samuel Foster's wife held one eighth. Woodward and Foster elect to take, the property is adjudged to them, and a deed made subject to the liens in favor of the others of said parties. The right and ability of Foster to elect is in virtue of his wife's estate. His election, then, with the order of court and deed of the sheriff, must be held, in order to make the defense available, not only to transmit to Samuel Foster, the tenant by courtesy, the estates of "*the others of said parties*," but also to take from his wife, her estate—the very property, in right of which alone he could make an election. 95] *We can not, for one moment, sanction such a proposition. On the contrary, we maintain whatever may be the effect of the partition proceedings, on the other rights, it can not disturb or affect the right of the wife of Samuel Foster. The party electing to take under the partition proceedings does not go into the possession as to his original right. He is already in the possession of that under a claim of title, and as to it the partition has no practical operation; but as to the other rights, the rights of the co-tenants, the partition proceedings do operate to transfer the title, estate, and possession. A tenant in common obtains a release from his co-tenants. He is in his original right under one claim of title, and in the purchased rights under another. The estates become consolidated by operation of the parties *in pais*, in the one case, and through the intervention of a court in the other. They are only different modes to obtain the same result. If we do understand the doctrine of tenures, and can compass the complex nature of estates, this must be the operation and effect of either mode of conveyance. It certainly would be the case, was the estate of a *feme covert* not concerned. Had Samuel Foster held the one-eighth in his own right, instead of his wife, could there have been any question upon this subject? Who would have said he held his original right that brought him into the partition under it? No one. It would be a solecism to say so, a perfect perversion of language, and a total misconception of the doctrine of tenures and estates. Suppose a judgment debtor, at sheriff's sale, should purchase his own property, would he acquire a new estate by the purchase? Surely not. The sheriff's sale is not even a betterment to his title. It would be nothing more than a receipt for

his debt. 5 Ohio, 239. Does the action of the court, on a partition case, vary the result? It is not pretended it does, where partition can be made by metes and bounds, nor where an election is made as to the original right of the party electing. How then, we ask, can the result be varied where a husband in possession in the right of his wife, and her right is the foundation of his action, elects to take the land at valuation? We maintain that the result is not varied. The operation of the partition was not to transfer from the wife her rights to her husband, or, in the least, change or disturb the tenure by which the interest of the wife was held. The statute does not contemplate such a change, and our notion of the law, and abstract justice, will not permit us to tolerate such a position. We therefore claim that Mrs. Foster's title to the undivided one-eighth was not changed by the partition. *We claim more, the election of her husband inured to [96 her benefit, and this leads us to consider our fourth and last proposition.

4. The election made by Samuel Foster in right of his wife, and his possession under that election, inure not to his own right, but to the right of his wife and those claiming under her. Under the statute the parties in interest have the right to elect. Samuel Foster, by courtesy, held a freehold interest in his wife's undivided eighth, which gave him a right to take under the statute, not in his own right, but in that of his wife. The proceedings show the fact as to his interest and rights, and the action of the court shows that he was not entitled to the legal conveyance; because the court only affirm the election, and leave the matter as to the transmission of the title by deed, under an order of court, for future determination. Foster took possession, we say, in the right of his wife (this we claim to be established by the proceedings in partition, and his deed from the *late sheriff*). There the matter rested—no order for a deed was asked—a discontinuance ensued, and the case was never again brought before the court. We do not claim to have the paper legal title to the three-eighths under the partition, but we claim that the possession and election under it, was the possession of Mrs. Foster, under whom the lessors of the plaintiff deduce title; and, upon that possession, they can maintain an ejectment against those who deduce title from Samuel Foster, who held the possession and freehold by courtesy, in the right of his wife. In Massachusetts (15 Mass.

294), it is held that an assignment upon a partition of the wife's property to the husband, must be taken to be in the right of his wife; and, by the same reasoning, an election by the husband, in virtue of his wife's interest, must be construed to be in her right, and to inure in her benefit. In Pennsylvania, (1 Serg. & Rawl. 460), it is held that an election of the husband, in right of his wife, inures to his wife. It can not be otherwise, because the right to elect is founded upon the wife's right; and the election of the husband, the legal organ of the wife, when made, attaches to her original interest, and does not pass the property elected to the husband, and also draw from the wife and her heirs her right, because the law does not authorize or contemplate such a state of case; and Mrs. Foster, when she signed the petition for partition, can not be presumed to have sanctioned any other appropriation of her rights than was necessary to meet the exigencies of the partition law. She applied for a partition, not to have her title taken from her and her heirs, and 97] *transferred to her husband and his heirs, but to have that set off to her in severalty which she then held in common. It is true the application for partition involved in it, by possibility, a divesture of her title by a sale or an election under an adversary right; but it never involved, and could not, a divesture of title under an election predicated upon her own claim, title, and estate. Such a thing could not be. It would be an impossibility. You might as well say an object could be moved by a lever when it rested upon the object to be moved as a fulcrum. It can not be. From the very nature of things it is impossible; and if my recollections are not in fault, the law never works or exacts impossibilities. We therefore maintain under this last aspect of the case, that in no event can the partition proceedings operate to defeat our right to recover the original right of Mrs. Foster; and we also maintain that, against those who claim under Samuel Foster, we have a right to recover the three-eighths taken possession of by him, under the partition in the right of his wife. It is no objection that the legal paper title is not in us, for it is the well-settled doctrine of this court, that a recovery may be had in ejectment, upon a prior possession alone, under a claim of title. 6 Ohio, 165; 7 Ohio, 146; 3 Ohio, 59, 254. The defendants can not object to our recovery, because they are purchasers from and under Samuel Foster, and have full notice, constructively, at least, of the

nature and extent of his title and possession, because they deduce the title through his deed from the sheriff and the partition proceedings, and are chargeable with notice of all they contain. 5 Ohio, 454; 6 Ohio, 240; 7 Ohio, 228. We admit, by the laws of Ohio, that Samuel Foster was entitled, by courtesy, to a life estate in the lands, of which his wife was actually or legally seized during coverture, they having had children born alive during that time, 4 Ohio, 170; and that a deed by him of the lands held in courtesy, though in fee, passes only his life estate, and after his death, his wife, if living, or her heirs or legal assigns, take or resume the estate in possession. 2 Wend. 362; 2 Ves. 483; 7 East, 321; 9 Mass. 508; 15 Mass. 472; 20 Johns. 301, 303; 10 Johns. 435; 16 Johns. 110; 6 Ohio, 313. It is also well settled, that during the tenancy, by courtesy, the statute of limitations does not run against the heir. 2 Wend. 368; 5 Cowen, 74. So that no objection can arise from the length of the adversary possession. Independent of this, no objection could arise, inasmuch as Mrs. Foster's heirs were minors at her death, and so continued until *within ten years before suit brought. But it may [98 be further contended that the heirs of Mrs. Foster, under whom the lessors claim title, are bound by the warranty of their father, Samuel Foster, who conveyed with covenants of seizin and warranty, and thereby they are estopped to assert title. In answer, we say that this is a collateral warranty, and not obligatory beyond the amount of the estate descending from the warranting ancestor. 5 Bac. Abr. 443, title Warranty, let. I; 4 Cruise's Dig. 436. The proof does not disclose that anything descended from Samuel Foster to his children. In fact he died insolvent.

Fox, for defendants:

It is claimed that this judgment in partition, followed up by a deed conveying the premises, completely vested the estate in Woodward and Foster, the persons who, by the judgment of the court, were permitted to take the property.

It will be perceived, by reference to the law in force at the time this proceeding in partition was had (1 Chase's Stat. 402), that the provisions of the law were complied with.

But it is said, that in consequence of the death of Hephzibah Foster, after the commencement of the suit, and before judgment, the subsequent proceedings, as to her share, are void. Such is not the law, as we understand it. The death of a party to a suit, before

judgment, does not, by the principles of the common law, render the judgment void. 2 Tidd's Prac. 1056; 3 Dal. 117–121.

The judgment was erroneous, but not void. And the statute of 17 Car. 2, c. 8, provides that death shall not even be cause of error if judgment is rendered within two terms after verdict. 2 Tidd, 847, 848; 7 Term, 31; Mitchell v. Starbuck et al., 10 Mass. 5; 1 Salk. 9; 3 Com. Dig. 569, Error, D; 2 Com. Dig. 53, Bail, secs. 2-5. Partition on petition by the husband, the wife not being a party, is valid. 2 Rawle, 137.

The present plaintiffs are privies in estate to Mrs. Foster, they are claiming under her and her heirs, and it is well settled that he can not object to the irregularity or errors in the proceeding to which his ancestor was a party, except by way of writ of error. The distinction appears to be this: A stranger to a judgment may invalidate it in a collateral suit, by showing that the person against whom it was passed was dead at the time, but a party or privy can, in no case, allege it to be void. This doctrine is fully examined and sustained in the case in 4 Cowen, 458, 459.

99] *It is insisted by the plaintiffs that the deed from Macfarland, the sheriff, to Samuel Foster, one of the persons, authorized to take the premises, ought not to be considered as vesting any estate, because they say that the recorder has made a memorandum on the margin of the record, that the deed was left in the office, subject to some arrangements with the grantee, but never delivered to him afterward. We can not see how this can affect the matter. When this memorandum was made is not stated, nor can it now be ascertained. One thing is certain, the deed was executed, delivered, and recorded, and when it is once admitted to record, we say the recorder's power over it is at an end. He has discharged his duty, and he can not destroy the effect of the registry, by anything he can say, or write, unless it is by evidence given under oath. The recorder's duty is to record all deeds duly executed and acknowledged, when left for record, and none others. If he recorded this deed without authority he violated his duty, and can he be permitted to say that he had so violated his duty? I should deny the competency of the recorder even to testify to his own breach of duty. If he could violate his official oath, what reliance could be placed on a subsequent oath of his?

But there is no oath offered to defeat the operation of this deed, and is it to be tolerated that a recorder can, after he has once re-

corded a deed, at any length of time, write a memorandum on the record, which shall destroy the title of the grantee? No confidence can be placed upon the truth of the records, if such memorandums are to be permitted.

Suppose a deed is made and recorded by the recorder the same day; on the succeeding day a person purchases of the grantee; he examines the records of deeds, finds the title apparently correct and purchases and receives his deed, can it be tolerated for a moment to permit the recorder afterward to write on the margin that the deed was recorded by mistake, and thus defeat the title of the second purchaser? Most clearly not. It is well settled that the mistake of the recorder in recording the deed will not affect a subsequent purchaser. 18 Johns. 563. Every one has a right to suppose the recorder has done his duty.

In the present case the deed from the sheriff to Foster was recorded on December 5, 1806, and on August 30, 1808, Foster and wife, and Woodward and wife, deeded the whole of the lot 92 to Hugh McClelland. Now, as before remarked, there is no evidence as to the time when this *memorandum was made on the [100 record. It can not now be told whether it was before or after the making of the deed from Foster and others to McClelland. I take it to be incumbent on the plaintiffs to prove when that memorandum was made, so as to charge McClelland with notice of the mistake.

But suppose any mistake was originally made, can it be possible, at this late day, that this court will not presume the arrangement spoken of in the memorandum, was not fully and satisfactorily completed, rather than to suppose Samuel Foster, the father of the present lessors, undertook to sell and deed property to which he had no title? It appears to me the charity of the law would tend to support rather than destroy the title.

I contend that if no deed could be found from the sheriff, at this late day, the court would be bound to raise the presumption, after so long a possession and claim of ownership, that the sheriff had made a deed agreeably to the requisition of the statute. The court will always presume the due execution and delivery of a deed, after so long a period, where the possession and claim of ownership is consistent with such a presumption.

And we claim that this presumption must be made in favor of Woodward's title. There is no deed to be found from Macfarland

to Woodward. But it appears that the sheriff was directed to make a deed to Woodward and Foster. He has made a deed to Foster for his half; Woodward took possession of his part; sold it out with Foster, in 1808, and those claiming under him have been in possession ever since. Is it not a fair case to presume a grant, under these circumstances? 1 Ohio, 349; 7 Wheat. 546, 110; 6 East, 215.

But as to the half, claimed under the deed from Woodward and Foster to McClelland, it is not material whether the court presume a deed or not, because we show by the deed to Woodward from Isaac Witherby and Hannah his wife, William Dixon and Rachel his wife, and Martha Gardner, dated November 20, 1804, executed in Massachusetts, that the legal title of these three heirs of John Cutter, and three of the grantees named in Symmes' deed, was vested in Woodward and his wife, having one eighth; one-half of the whole lot was, by virtue of the deed to McClelland, in him. The deed was executed in 1804, and was a valid deed to possess the estate under the laws of Massachusetts, and should it be necessary, for the court to satisfy itself of this fact, I will refer them to the law of Massachusetts then in force. 1 Mass. L. 112.

101] *By this law it is provided, "that deeds signed and sealed by the party, and acknowledged before a justice of the peace, and recorded at length, shall be valid to pass the title without any other act or ceremony; and no bargain, sale, mortgage, etc., shall be good against any other person or persons but the grantors and their heirs only, unless the deed or deeds be acknowledged and recorded in manner aforesaid."

Under this law it has been held that a deed executed by husband and wife, and acknowledged and registered, is good against a *feme covert*. 7 Mass. 14; 8 Pick. 533.

That such deed is sufficiently acknowledged by the husband alone; that one of the parties acknowledging a deed gives it sufficient notoriety, and such deed, when admitted to record, is binding upon all. 3 Mass. 579; 9 Ib. 211; 6 Pick. 87; 8 Ib. 536.

And it is also held that such a deed is good without any acknowledgment as between the parties to the deed. 5 Mass. 454, 459, 463; 6 Ib. 30, 489; 9 Ib. 211.

If, then, this deed was duly executed according to the laws of Massachusetts, it was under the law of January 20, 1802, valid and obligatory in Ohio. 3 Ohio, 114.

It appears perfectly immaterial, therefore, whether the court do or do not presume a deed made to Woodward, inasmuch as we show a clear title to his one-half, independent of any such deed.

N. WRIGHT, in reply:

The counsel for the plaintiff contends that the proceedings in partition were not pending at the death of Hephzibah Foster, because it does not appear that publication had been made at her death. As to this fact, were it necessary we should insist that the publication was made before her death. The order for publication was made August 14th—her death was in September or October—of course can not be assumed as proved earlier than October. Every presumption is to be made to sustain legal proceedings after so long possession; and on the case as it stands, therefore, the publication was before her death. But this is immaterial. Hephzibah was a petitioner. As to her, the suit was pending from the time of the petition filed—certainly from the time of the order of court thereon, of August 14. Publication or service of notice had no reference to her, for she was already *before the court. The cases relating to the time at which [102 defendants became parties to the suit, or in other words at which they are to be considered so far before the court that the suit operates as *lis pendens* against them and their interests, are not applicable to the present case.

Several special exceptions are taken to the form of the proceedings in partition, in reply to which it is sufficient to refer, without citing them, to the various decisions of this court in such cases. After an order has been made, the court has nothing to do, in a collateral inquiry, with the informalities and errors connected with the order. We refer also to Voorhees *v.* Bank United States, 10 Pet. 474, where the same doctrines were fully sustained.

If Mrs. Pillsbury was married when the petition was filed, so far from rendering the judgment void, even as against her, it is a question whether it must not have been plead in abatement, and could be even cause of error. 1 Chit. Pl. 437, 449; 3 Bos. & P. 128. In Pennsylvania they hold that the partition is valid, and binds the wife as to her lands, as though her husband only be party (2 Rawle, 137), and this on common law principles.

But suppose Mrs. Pillsbury was not bound, only she, or those claiming her interest under her, could controvert these proceedings. Those who were duly parties to the proceedings are bound, and have nothing to do with other interests than their own.

That publication was made and duly proved is of course to be inferred, from the fact that partition was ordered. 10 Pet. 472, and cases cited in Glover's Lessee *v.* Ruffin, 6 Ohio, 264.

The facts on which a judgment is founded are not a necessary part of the record; and especially in relation to proof of publication, it is well known that the mode of proof, common in practice, was to exhibit to court the file of newspapers. The same answer is also applicable to this point, viz: that it does not affect the interest of the plaintiffs, but of another party to the partition only.

It is said, also, there is no order for a deed. The order in the case, though not technically formal, is an adjudication of the property to Woodward and Foster. This is clear. "The court accept the report, and allow Foster and Woodward to take the property jointly between them at the valuation." This is the adjudication required by the statute, section 5, and on this adjudi-

103] cation *the law directs that the sheriff execute a deed. It is not required that the order shall especially direct the sheriff to make a deed, for it is made his duty so to do on the general adjudication.

As to the question of a deed by the *late* sheriff, we differ on the fact. The deed purports to be made by the acting sheriff. The acknowledgment speaks of him as *late* sheriff. The deed is dated September 12, 1806, and acknowledged November 26, 1806. Between these two dates the ordinary term of a sheriff's office may expire. The utmost that would be inferred from the deed is, that it was made by the sheriff in office, and acknowledged after his term expired; and such acknowledgment is regular. 1 Ohio, 317; 6 Bin. 254.

The statute did not require such deed to be acknowledged in court. Such acknowledgment was required, at that time, in no case except a sale on partition proceedings. There was some reason for it in that case, not applicable to this. In case of sale, objections to the regularity or fairness of the sale might arise, which ought to come before the court. It is sufficient, however, for us, that the statute requires it in one case, and does not in the other.

On the effect of the marginal memorandum in the record, we have spoken sufficiently. If any regard can be paid to that memorandum, it can not be doubted that the long-continued and quiet possession under that deed would not only warrant, but require a presumption of a subsequent delivery. The *execution* of a deed is presumed on much slighter grounds, and surely the *delivery* should be presumed of a deed shown to be in existence. We are not presumed to have it in possession, as we hold under warranties, and it rests with the plaintiffs to rebut the legal presumption.

It is contended that the proceedings in partition do not operate to change the title of Hephzibah Foster, so as to vest it in her husband. As to this, it is sufficient to say, that such is the clear adjudication of the court. Foster and Woodward take the property. The deed conveys the half. Whether this was a correct decision of the court, is now a question to be canvassed. This is not a writ of error. This court has sufficiently settled the law, that adjudications of a competent tribunal, however defective or erroneous, are not to be impeached collaterally. 3 Ohio, 561, 562, 257; 4 Ib. 305, 273; 5 Ib. 500, 524; 10 Pet. 474.

*But were this even a case on error, it would probably be [104 sustained. The statute points out who may be parties to a petition for partition, and the provision is, that any one or more of the *parties* may elect to take the estate. Any one who is party to the suit, may take the whole. This may be a strong measure; the whole provisions of the law, for either an election or sale, seem to be strong measures; but not more so in the case of the husband taking the estate of the wife, than in taking the estate of any other tenant in common. Suppose the case of a tenant for life, and remainder-man in fee of one share in common. Both are proper parties to the partition; can there be any doubt that the whole estate might be adjudged to either on election? So in the case of the husband; his estate is a freehold, even of a higher nature than an ordinary tenant for life. He alone can make a tenant to the principal to bar the entail on a recovery, he can bind her estate in partition, and in other cases. 2 Bin. 10, 23; 1 Thomas' Coke, 820 (711); Co. Lit. 171, a; 1 Atk. 541.

We see no reason, therefore, why the estate may not be adjudged to him, as well as to any other of the parties interested in the property. If the wife's separate estate is to be protected against the disposal or improvidence of her husband there is ample

remedy in chancery for all such protection. Neither this court, nor that which directed the partition, have any occasion to regard such considerations.

It is further insisted, that all the interest which Foster took under the partition, was taken in right of his wife, and therefore the plaintiffs are now entitled to recover the half, and a case in 1 Sergeant & Rawle, 460, is cited.

If it were material, it could readily be shown, that the statute of Pennsylvania, of April 19, 1794 (Pend. Abr. 235), under which the case in S. & R. arose, is entirely different from ours. That statute gives the election to the child, or children only, and in a particular order, and it is to them only that the property can be adjudged, not *any party* to the suit, as in our statute. It is evident, under their statute, that the property should not be adjudged to the husband of a child. Yet it does not appear from the above case that such an adjudication would not be held valid, when collaterally considered; and after the case of McPhearson *v.* Cunliff, 11 Serg. & Rawl. 435, it can hardly be doubted that it would. But the case in question shows that the property there taken was

105] taken in right of the wife, not intended *to be divested from her, and that the case was considered as an ordinary partition, with something allowed for *owelty* of partition; of course, it has no analogy to the case at bar.

But in addition to this, it is difficult to conceive on what grounds the heirs of Hephzibah Foster can claim to recover by virtue of the effect of the proceedings in partition. If those proceedings were effectual, they were available for what they purport to be; if not, they left the estate as they found it. It does not even appear that Foster ever had possession in fact; and if he had, all the benefit of it is transferred to us. The judgment of the court is, that Foster take the property, and the deed is accordingly. How that can be construed to mean that some other person shall take it, is difficult to conceive. The effect of these proceedings also is, that Foster takes the particular share of his wife, and the other shares not represented by Woodward. If one co-parcener has his share incumbered, and afterward by election takes the whole, this share remains specifically incumbered as before, and the same principle must apply, if two take the property between them, each having his share incumbered. If, in the present case, Woodward had the three or four shares, which he held, incum-

bered before the partition, the incumbrance would remain on his particular part, after the election and deed to him in partition, and the part of Foster would be clear of that incumbrance. So if the right of Hephzibah Foster was not vested in her husband, but remained to her heirs, that could not affect the title of Woodward to his half, but the share of such heirs must come out of the part assigned to Foster, leaving Woodward his full half. Such is the necessary effect of the adjudication, and such is the purport of all the proceedings in the partition. Hence if we had not shown sufficient presumption of a deed to Woodward, or that no deed to him was requisite, still no crevice would be left open for a recovery by these plaintiffs.

By the English common law, before it was altered by statute, we suppose that the warranty of Foster, descending on these plaintiffs, would bar them of this claim. It is a collateral warranty, binding the heir without assets; said to be a very hard case, but yet one against which even chancery would never relieve. 10 Mod. 3; 3 Thos. Coke, 328, (208.)

By 4 Ohio Stat., and 5 Ann, c. 16, perhaps such warranty would not bind in the present case, though it binds in many cases without assets, notwithstanding that statute. But it would be difficult to show that this statute was the law of Ohio. But we do *not think it necessary to pursue this abstruse doctrine. [106 We prefer to rely upon the simplicity of our own legal titles and judicial proceedings, and upon the great principles in which there can be no hardship and no injustice, so often reiterated by this court, and the other ablest courts of the Union; that judicial proceedings, however informal, are to be held effectual; that those who have relied on the courts of justice for their titles shall not find themselves deluded.

Judge LANE delivered the opinion of the court.

The defendants hold the estate of Samuel Foster. If he acquired a fee, by the proceedings in partition, it has passed to the defendants; but if his estate, in the half lot, or in any part of it, was for life only, and at his death passed to the heirs of his wife, the plaintiffs may recover it in this suit.

The mistake of the name of Mrs. Pillsbury, in the petition, and the omission to name her husband, are of no moment in this case. If she should interpose her claim to her original share, other

questions may arise. But if these litigants have any right to it, it must flow through the sheriff's deed, a common source of title, which neither is at liberty to contest. 5 Ohio, 197.

The estate which a husband holds in his wife's lands, as it may endure for life, and is determinable at no certain period, is a freehold. Co. Lit. 42, b; 351, a; 273, b; 325, b, n. 2. His estate is terminated at the death of the wife, unless the conditions exist, by which he retains the freehold, as tenant by the courtesy.

In view of the law, the holder of the freehold is the owner of the land. He is entitled to the possession and usufruct; chargeable with the feudal services under the old law; and in more modern times, with the taxes and other burdens incident to land. As the intestate for life and the remainder or reversion, constitute but one fee, the law makes him the tenant to the precipe, and intrusts him with the defense of suits brought to recover the land, with the privilege of praying their aid; and the record of a recovery, in a real action, in all cases where aid is prayed, and in some cases without it, is conclusive on their interests as privies. Co. Lit. *ut supra*, 362, a; 2 Black. Com. 362; 3 Ib. 193.

A voluntary partition may be made by tenants for life, holding estates in joint tenancy or coparceny; when made by husbands, of wives' lands, if equal, it binds the inheritance. The writ *de partitione facienda* must be brought against such a tenant. It lies at common law against the tenant by the courtesy, although 107] a *stranger, and the benefit of this writ was given to him by the statute. 32 Henry 8, c. 32; Lit., sec. 264; Co. Lit. 174 b, *et seq.*, and 171 a. n. 2.

The statute of 1804 (3 Stat. 378) gives to any joint tenant, tenant in common, a parcener, the right of making a partition, by petition to the court. Under this law, Samuel Foster, and his wife Hephzibah, who was properly joined in the writ (Lit., sec. 256; Co. Lit. 170, 176), united with some of their co-tenants in the proceedings before us. During the life of his wife, Foster was a necessary party to represent her interest; by her death, his estate by the courtesy continued him the tenant of the freehold, without determining his rights or interests.

The court, having the case before them, proceeded to appoint commissioners to make partition, who reported that no division could be made without impairing the value of the land; leave was given to Woodward and Foster, two of the parties to the proceed-

ings, to take it at appraisal. The statute gave to the sheriff authority to convey, which he has executed. The irregularities which are alleged to exist in these proceedings are not of such a character as render them void, when questioned in this collateral way. 5 Ohio, 255; 7 Ib. 257; 2 Pet. 157; 10 Ib. 450.

It is alleged that the deed is defectively executed, it being acknowledged by "the late sheriff." The case shows that the deed was made by the sheriff while in office; his subsequent acknowledgment, although after his term has expired, is carried back, by relation, to the time of execution.

The marginal note, made by the recorder on the registry, can not be admitted as evidence to affect the validity of the deed. When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is *functus officio*, and has lost his power over the subject.

We are, therefore, led to conclude that these proceedings must be taken as valid between these parties, and that Foster acquired the rights of Abigail Pillsbury, and Mary and Seth Cutter, under them. The plaintiffs urge, that as Foster was a party to the suit, as a tenant for life, of an estate, the remainder of which belonged to them, all his acquisitions were in that character, and should inure to their benefit after the determination of the particular estate. The soundness of this position is not admitted; Foster was a party to these proceedings in his own right, pursuing his *own interests, in the course of which he acquired the [108 lands of these co-tenants by purchase. He can not charge the remainder with the purchase money. It is not just that they should reap the benefit of his advancement, or enjoy that for which they have never paid.

The remaining eighth, the original share of Mrs. Foster, being already the property of Samuel, was not the subject of this sale. The interest of the remainder was not before the court, as no partition could separate it from the particular estate, and no money was professed to be paid for it. As the estate by courtesy has determined by the death of Foster, the remainder has become an estate in possession, and may be recovered in this suit.

Judgment for plaintiffs for one eighth.

PAULINE ANDERSON *v.* GARLIN ANDERSON.

To a suit upon a judgment rendered at law, in Virginia, the plea that it was obtained by fraud, is not available, but the judgment can only be directly impeached in chancery.

THIS cause was adjourned from the county of Brown.

It was an action of debt, founded upon a judgment recovered in the county of Notaway, of the commonwealth of Virginia. Defendant pleads, first, in general terms, that the judgment was obtained by fraud, upon which plea there is an issue in fact. In a second and in a third plea, the fraud relied upon is specially alleged. To these pleas there were general demurrers, upon which the cause was heard.

COLLINGS, for plaintiff.

HAMER and DEVORE, for defendant.

Judge GRIMKE delivered the opinion of the court:

It is remarkable that this question has never received a precise determination. As the books abound so fully in the general doctrine, that fraud avoids all judicial acts, and the proposition is so often asserted in terms which import that a judgment may for that cause be impeached collaterally; that one would expect to meet with several cases in which the question had been directly adjudged. In Borden *v.* Fitch, 15 Johns. 121, the defense was placed on the ground of want of jurisdiction, in the Supreme Court of Vermont, to decree a divorce, the defendant to the petition residing in another state, and having no notice of the proceed-

109] ings. *It is, however, *said* by the court, that as the decree was obtained by false and fraudulent representations it was void, and Fermor's case, 3 Coke, 77, is relied upon as the only authority. It is surprising that a court, which had long before decided that a deed obtained by false representations could not be avoided at law, should uphold the doctrine that a judgment, a much more solemn instrument, might be impeached for that cause. In the case before them, it is unnecessary to decide upon the general question; because nothing is now better established than that where a judgment has been obtained without personal notice to the defendant, it is only to be regarded as a foreign judgment,

and is not comprehended in the provision of the constitution of the United States. But it is important to examine Fermor's case. It was a bill in chancery to annul a fine; that is, it was a proceeding directly instituted to get rid of a judgment at law. Richard Fermor, the plaintiff, demised land to the defendant, Thomas Smith, for twenty-one years. Afterward, Smith fraudulently levied a fine, to bar the plaintiff of the inheritance. And it appears to have been a great question then, whether the plaintiff could be relieved, even in chancery; for it is said that it was debated two days, before all the judges of England and the barons of the exchequer, when it was finally determined in his favor. So that Fermor's case, so far from being an authority in support of the position that a judgment may be impeached collaterally, is an authority the other way. In the case of Borden *v.* Fitch, however, it must be remembered that it was a third person, and not a party to the judgment, who was permitted to avoid it. But in Andrews *v.* Montgomery, 19 Johns. 162, and Shumway *v.* Stillman, 4 Cowen, the same general doctrine is repeated. It is said, the court had never understood that the decision in Mills *v.* Duryee, 7 Cranch, was intended to be carried so far as to preclude a party from showing fraud in the procurement of the judgment. In neither of these cases, also, was it necessary to decide upon that question; what is said is only by way of argument. In Mills *v.* Duryee it was held, that the judgment of a sister state was a record conclusive between the parties, and that it could only be denied by the plea of *nul tiel* record. It has been doubted (Shumway *v.* Stillman, 4 Cowen), whether it was intended to say that it was the only plea or the only general issue plea which could be pleaded. And this doubt is suggested in order to open the door to the doctrine that such a judgment may be impeached by showing want of jurisdiction in *the court or by show- [110 ing that it was fraudulently procured. As to the first, the suggestion is unnecessary, because the plea of *nul tiel* record reaches it; and as to the second, it becomes important first to establish the general doctrine that a judgment may be impeached collaterally for fraud before we can fasten any such implication upon the decision in Mills *v.* Duryee.

In Pierce *v.* Jackson, 6 Mass. 242, it was held that where one who has obtained a judgment upon a fraudulent contract sues the sheriff for a false return, he may show such frauds in his defense

in favor of the other creditors. The case, then, differs in three particulars from the present: 1. The defense was permitted to a third person; that is, to the sheriff, who represented the creditors. 2. The sheriff himself was not a party to the original judgment. 3. There was no court in Massachusetts possessing chancery jurisdiction.

With regard even to foreign judgments, there appears now to be the strongest inclination to depart from the former doctrine, that they are only *prima facie* evidence. In Tarleton *v.* Tarleton, 4 M. & S. 21, where it was rigorously contended that a foreign judgment was re-examinable, Lord Ellenborough remarked that he did not sit at *nisi prius* to try a writ of error upon the proceedings of the court abroad. Lord Hardwicke had long ago maintained the same doctrine, and declared that where a court, *foreign* or *domestic*, that has jurisdiction of the case, makes the determination, it is conclusive and binding upon all other courts. Boucher *v.* Lawson, Cas. S. Hardwicke, 89. And in the late case of Martin *v.* Nicolls, 3 Simon, 458, the vice-chancellor, after a diligent examination of all the law on the subject, upheld, as the true doctrine, that foreign judgments were conclusive evidence and not open to examination, and *that this was the true result of the old authorities.* And any one who will undertake to consider the pressing and almost insuperable difficulties attendant upon a different state of the law, will be surprised that a contrary doctrine has ever been maintained.

If such is the view which is now taken of the efficacy of foreign judgments, what shall we say of the attempt to impeach, collaterally, a judgment of a sister state which has all the force and validity of a domestic judgment? That it can not be vindicated either upon principle or authority, and that although loose *dicta* in abundance may be found to countenance it, yet that it has no root, either in English or American jurisprudence. In Wightman 111] *v.* Wightman, 4 Johns. C. C. 343, which was a bill *filed to declare the marriage of the parties null on the ground of lunacy of the defendant, the court entertained the suit, saying that although the statute pronounced the marriage absolutely void, yet it was eminently proper that proceedings should be directly instituted, in some court of competent jurisdiction, to declare its nullity. A court of chancery, in a proper case, will interfere, after verdict and judgment at law, in cases of fraud. 2 Atk. 190; 2 Ves. jr. 135. Whether this is such a case is not now to be deter-

mined. That may seem to be a technical rule, which sends a party into another court for relief. But the adherence, to even technical rules, is attended with manifold advantages. A wise man, however high his faculties, will be disposed to observe them. The introduction of order, regularity, and precision into the practice contributes, more than any other circumstance, to the due administration of justice. It banishes disorder and confusion from the court-house, and establishes system and arrangement in the examination of every controverted question.

Levi Rich v. The State of Ohio.

In an indictment for stealing bank bills and promissory notes, it is necessary, under the act of 1835, for the punishment of crimes, to aver in the indictment that the accused knew that the papers stolen were bank bills and promissory notes, and to prove such knowledge on the trial.

This cause was adjourned from the county of Portage.

Judge Wood stated the case, and delivered the opinion of the court:

The plaintiff was indicted, tried, and convicted of *grand larceny*, at the February term, 1837, and sentenced to imprisonment for *three years*, in the penitentiary. The indictment avers, in substance, that certain *bank notes, and divers promissory notes*, the property of Jared Jennings and James Haggart, of the value of two hundred and sixteen dollars, the plaintiff in error did feloniously take, steal, and carry away, *then and there knowing them to be such.*

The indictment is drawn on section 19 of the act for the punishment of crimes, passed on March 7, 1835. 33 Ohio Stat. 36. The enactment is this: "That if any person shall steal, or maliciously and feloniously destroy any bank bill, or bills, or promissory note, or notes" "of the value of thirty-five dollars, or upward, *knowing them to be such*, any such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary, at hard labor, not more than *seven* years, nor less than *one* year."

*On the trial, a bill of exceptions was taken by the counsel [112
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for the plaintiff in error, from which it appears the court charged the jury that the words "*knowing them to be such*," in said section, referred to the malicious and felonious destruction, *and not to the larceny of the bills or notes specified. In this instruction to the jury* it is contended the common pleas *erred.* This is the principal question raised on the record, and the only one we shall consider. The rule is, that statutes must be construed according to the intention of the law-making power. If practicable, that intention must be gathered from the words employed, or used in the act, and not *aliunde.* These words are, "that if any person shall steal, *or* maliciously and feloniously destroy," etc. "*knowing them to be such*," etc. The crimes specified are *two;* they are in the alternative, but we know of no rule of law which would exclude the *scienter* from the *one*, and fix it upon the other, any more than the punishment which is prescribed. It appears to us clearly, from the words of the act, that no such construction can be sustained as within the meaning of the legislature. But leaving the *words* of the act, is there any substantial reason which can be given why stealing a note, *without knowledge of its character*, should be *criminal*, and *feloniously destroying such note without such knowledge*, innocent? The pleader, who drew this indictment, thought differently, and has averred the *scienter;* and we entertain the opinion that proof of it, on the trial, *was required to convict the accused.*

The case of Gatewood *v.* Ohio, 4 Ohio, 386, may properly be considered as decisive of the question. Gatewood was indicted on section 19 of the act of 1824, for the punishment of crimes, 22 Ohio Stat. 161, for stealing *bank bills.* On conviction, he sued out his writ of error and took the objection, that the *indictment contained no averment that he knew the bills stolen to be bank bills*, and the judgment was reversed.

The *two* sections of the *different acts* are substantially, and so far as the present question is concerned, *precisely similar.* In re-enacting section 19 of the act of 1824, with the construction put upon it by this court in 1831, in the *same words*, it is reasonable to suppose the general assembly intended the *scienter* of the accused as a *necessary ingredient* to constitute the crime, in a charge for stealing bank bills, or notes.

The judgment is reversed, the prisoner remanded, and a *venire facias de novo* awarded.

*Olive Township v. Manchester Township. [113

To prevent a pauper obtaining a settlement by twelve months' residence, it is necessary that the overseers of the poor of the township where the pauper may be, should strictly comply with the law, in warning him to depart by warrant, and in returning the warrant to the township clerk, and causing it to be recorded.

This was a motion for a writ of error, adjourned from the county of Morgan.

Nye and Parish, for plaintiff.

Goddard and Hanna, for defendant.

Lane, J., stated the case, and delivered the opinion of the court:

The facts, upon which the opinion of the court must be predicated, are these:

Nathan Maltheney and family, in 1833, were settled in the township of Manchester. In the spring of 1833, they removed to the township of Olive. On November 10, 1833, the overseers issued their warrant to the constable, to warn them from the township of Olive, which was served upon the paupers, next day, by reading. The constable indorsed the certificate of his doings on the warrant, but neglected to return it to the clerk of the township; so that no record had been made of it, and it is lost. The question is, whether this constitutes such a warning, under section 4 of the act for the relief of the poor, vol. xxix, 321, as prevented the pauper from acquiring a settlement in the township.

The duty of supporting a pauper is cast upon the township where he resides a year; but this burden may be avoided within the year, if the township officer issue the warrant, serve it, make a certificate of service, return it to the township clerk, and have it entered upon the township records within three days after service is made. The object of this record seems to be, not merely to furnish testimony of the service of the warrant, in which case other evidence is admissible, as to be itself in the nature of a declarative act, by which the pauper may know where to apply for relief, and the township enabled to ascertain the extent of their liability. Viewed in this light, in a case between townships, who stand in equal equity, we deem it expedient and just, to require a plain and obvious compliance with the law from those who seek to avoid the obligation. Motion overruled.

114] *LESSEE OF SAGE KELLOGG v. ANTHONY McLAUGHLIN.

A sale of land for taxes is not valid, unless the record of the advertisement of the list of delinquents for four weeks, between the first of October and the first of December, be recorded in the auditor's office as the law requires.

ACTION of ejectment, reserved in the county of Richland.

This action was brought to recover the possession of lot number 34, in the town of Vermillion, Richland county. The case, by consent of parties, was submitted to the court. The plaintiff claims title under a deed executed by the county auditor, pursuant to a sale for tax. The town lot in question appeared to have been regularly entered for taxation, although not in the name of the rightful owner, and was returned delinquent for the non-payment of the tax of 1831, and was sold for the tax of this year, together with the accruing interest and penalty, and the tax of 1832. In support of his title, the plaintiff offered in evidence a certificate of the county auditor contained in his records, wherein it is alleged that said auditor had caused the delinquent list for taxes to be published, in a newspaper printed in said county of Richland, for four successive weeks, "between the *first Monday* in October and the *first Monday* in December in the year 1832." This evidence was objected to, because it did not appear from said certificate that said delinquent list had been published four weeks, between the *first day* of October and the *first day* of December of that year. This objection was sustained by the court, and the testimony rejected. Whereupon the plaintiff offered to prove, by parol, that the delinquent list was actually published four weeks, between the *first days* of October and December, and the question whether such evidence could be properly received, was reserved for decision by the court in bank.

The case was argued by BARTLEY, for the plaintiff, and by BARR, for the defendant.

Judge HITCHCOCK delivered the opinion of the court:

Although the question reserved does not necessarily require it, still it seems proper, in the first place, to consider, whether the court properly rejected the evidence offered from the records of the county auditor. For if, in this particular, there was error, the

other evidence offered is unnecessary, and without it the plaintiff will be entitled to judgment.

The circumstances under which lands may be sold for taxes are pointed out in the law, "prescribing the duties of county auditors," 29 Ohio L. 280, taken in connection with the law *"prescribing the duties of county treasurers." 29 Ohio L. [115 291. And the first of these laws prescribes the manner of sale. By section 46 of the former act, it is provided "that every tract of land and town lot offered for sale by the treasurer, as in said act provided, and not sold for want of bidders, shall be, and is declared to be forfeited to the State of Ohio, and thenceforth, all the right, title, claim, and interest of the former owner or owners thereof shall be considered as transferred to, and vested in said state, to be disposed of as the legislature may, by law, direct." It is conceived that a penalty so severe as this can not with propriety attach, unless the officers of the government, its agents, have strictly complied with and fulfilled their duty. The law must have been strictly performed.

In the case before the court, the lands were not forfeited to the state, but when offered by the treasurer were sold for the taxes. But had they not been sold, the penalty of forfeiture would have attached. It would seem to follow, that unless the forfeiture would have been legal, the sale itself can not be legal, and can confer no title, for it would be absurd to say that a sale can be good when the preliminary proceedings have been so defective, that had there been no sale, there could have been no legal forfeiture.

In the act before referred to, "prescribing the duties of county auditors," the duties of that officer are pointed out plainly, and specifically, and it would seem that there was no necessity that they should be mistaken. In section 30, it is required that the county auditor, as a preparatory step to the sale of lands for taxes, "shall cause the delinquent list to be published at least four weeks, between the first day of October and the first day of December, in some newspaper, printed in his county, if any be printed therein," with a notice attached that the lands will be sold on the last Monday of December, unless the tax shall be paid before that time.

In section 3, it is provided "that the county auditor shall, before the day of sale mentioned in such notice, record in a book to be provided for that purpose such delinquent list and notice,

copying the same from the paper in which they shall have been published, and shall certify, at the foot of said record, the name of said paper, and the length of time such list and notice were continued therein."

The object of these two sections is manifest. The design of the first is to give notice to the public what lands are to be sold, and to give notice to the proprietors of these lands, that unless the taxes are paid, the lands will be offered for sale on the day 116] *specified. The design of the last, that there may be at all times in the auditor's office record evidence that the requisitions of the law, directing notice to be given, have been complied with.

The evidence offered in the present case and rejected, showed that the delinquent list had been published four weeks in succession in a newspaper printed in the county of Richland, after the first day of October, 1832; but it did not show that the last of these publications was before the *first day* of December in that year. It was before the *first Monday* in December, but the first Monday was not the first day of the month. It did not then conduce to prove the fact, that publication had been made within the time, and in the manner required by the statute, and it was therefore properly rejected.

The next question, then, and the one reserved is, can the fact that the publication was actually made within the time prescribed by the law, be proven by parol. The auditor's record, although evidence, can not be held conclusive upon a person defending against a forfeiture, or a tax title. The auditor is not *his* agent, but the agent of the government. Of course, he ought not to be concluded by the acts or records of that officer. Such person might show, by matter *dehors*, that the law had not been complied with, as that the delinquencies had not been returned, that the delinquent list had not been published at all, that it had not been published at the proper time, or that it had been published in a different paper from the one named by the auditor.

But the case is different where an individual claims under such title. The law has made provision that a record shall be made of all the proceedings in matters of this sort, by means whereof titles of this description may be ascertained. It is under, or in pursuance of these records, that the tax purchaser claims title, and unless they show in him a legal right, such right can not be

shown by parol. As our laws are now constituted, it would be a dangerous principle to adopt, that tax titles may be sustained partly by record and partly by parol proof. If the county auditor had failed entirely to make the record required in section 31 of this act, it will hardly be contended that parol proof of the facts therein required to be recorded could be admitted. But no reason can be assigned against receiving such evidence which may not, with equal force, be assigned against receiving the evidence now offered. In the opinion of the court, this evidence can not be received. Judgment must therefore be rendered for the defendant.

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*MATTHEW ACHESON ET AL. v. THE WESTERN RESERVE BANK. [117

The court can not, upon a writ of error, notice a bill of exceptions that is not made part of the record.

THIS was a writ of error reserved in the county of Trumbull. The original action was assumpsit upon sundry indorsements. At the trial, the plaintiff in error objected to various points of testimony, in which they were overruled; but at the time of the trial, no bill of exceptions was presented, or put on file, as was maintained, on the part of the defendant in error.

SUTLIFF, for the plaintiff in error:

It is urged by defendants that the bill of exceptions, upon which reliance is placed for proof of many of the errors assigned, is no part of the record.

What evidence of this fact is there before the court? None, except that the certificate made by the clerk (who, by the by, is *one* of the defendants) precedes, rather than follows, the bill of exceptions.

Section 96 of the practice act, which gives to a party the right of preferring a bill of exceptions, on the trial of any cause in common pleas, makes it the duty of the judges concurring in the decision to which the exceptions are taken, "to sign and seal a bill, containing such exception or exceptions as heretofore, in order

that such bill of exceptions may, if such party desire it, be made a part of the record in such suit."

The question then arises, is there any evidence before this court that the bill of exceptions in question has been tendered, and signed and sealed in accordance with the requisition of this statute, and so as to entitle the party tendering the same to any benefit from the bill? The bill commences in the usual manner. It proceeds to relate all of the proceedings had on trial of the cause, in a summary manner, and the several exceptions taken by the party, and concludes in the usual words, "To all of which the defendants except, and the *court here sign* the defendant's bill of exceptions, *that the same may become part and parcel of the record.*"

The court have signed this bill, and its contents is the language of the court relative to the trial—as much so as a judgment, or any other official act of the court. The same was left in the hands of the clerk, and if not copied into the record book in a skillful or 118] *proper manner, it nevertheless, being signed by the court, was then, and continues to be, part and parcel of the record. The whole of the objection to the bill of exceptions being regarded as strictly belonging to the record, is the fact that the clerk has not copied it in its proper place. The same objection might be urged to any part of the pleadings on record, if left out of their proper place by the clerk. When the bill was sealed and signed by the court, and deposited with the clerk and filed in his office, he had no right to omit inserting the same as a part of the record; for the court say, in signing the bill on the trial of the cause, "And the court *here sign this*, the defendant's bill of exceptions, *that the* same *may* become *part and parcel of the record.*"

All the proceedings had in a cause, which *belong* on the record, especially when signed by the court, and as they say in this case for the purpose of being made up in the record, are in fact parts of the record, and together constitute the records of the cause, although the same should remain in the files or journals, and never be formally copied into the record book. Judge Swift, in the first volume of his Digest, page 771, in speaking of bills of exceptions, says, "*When signed it is considered as part of the record in the cause.*"

In the present case, it appears from the bill that the errors were *assigned*, and that they were noted for the purpose of being made a part of the record, and that the same were duly signed by

the court and left with the clerk. The statute does not *require* any *order* of the court, or anything further from the party, in order to entitle him to the benefit of the bill of exceptions contemplated by the statute.

PEASE, for the defendant in error:

The errors assigned, and which will be relied on, are predicated upon a supposed bill of exceptions, which is appended to the copy of the record, but which is no part of the record, nor ever was, nor is returned by the clerk as such, nor was it filed with the clerk until two or three months after the court. This being disposed of, I can discover no suspicion of error to answer unto.

The court will notice that the copy of the record was made out December 1, 1835, and the bill of exceptions was brought to the office probably in February following, when the last certificate was made, but was never regularly filed, and no order of *court that it should be made a part of the record, so informs [119 the clerk.

Judge WOOD delivered the opinion of the court:

We have examined the question raised, whether there is a bill of exceptions in this case, and our conclusion is that there is none. Attached to the record, and sent up with it, there is a separate paper, certified at the bottom by the clerk, as being the original bill of exceptions on file. This paper is signed by three of the judges; when or where signed does not appear. It bears no date; there is no certificate when it was taken, no evidence when it was filed; there is no order of the court making it part of the record of the cause.

Our *practice act*, section 96, provides that in civil cases the bill of exceptions may be made part of the record, if the excepting party request it. The court have repeatedly ruled that if a party would avail himself, upon error, of exceptions taken, at the trial in the common pleas, he must cause such exceptions to be made part of the record. In Baldwin *v.* The State, 6 Ohio, 16, it was decided that no matter could be noticed, on error, which did not appear in the record so as to make part of it. In Hosmer *v.* Williams, Wright's C. 355, there was a bill of exceptions, as in this case, returned with the record, but the court held that it must be disregarded, because not made parcel of the record. In this case,

the court say, it has been repeatedly decided that if a party would avail himself of a bill of exceptions he must have it recorded, as required by the practice act.

In this view of the case there is nothing before us to examine but the pleadings and judgment. Perceiving no error in these, the judgment must be affirmed.

Judge HITCHCOCK, being a stockholder in the Western Reserve Bank, did not sit in this case.

120] *MARTHA HUBBELL *v.* ADMINISTRATORS AND HEIRS OF SAMUEL BROADWELL ET AL.

Where the mortgagee purchases the mortgaged premises, under judicial proceedings, and continues to own them until such judicial proceedings are reversed, the mortgagor is entitled to his right of redemption.

THIS is a suit in chancery to redeem a mortgage, reserved for decision, from the Supreme Court of Hamilton county.

The bill states that in 1819 she united with her husband in mortgaging to Samuel Broadwell, the defendants' intestate, certain lands lying in Cincinnati, which she held by descent from her father. A copy of the deed is made an exhibit, appended to the bill, and she submits if its form is available to convey her estate. Proceedings in *scire facias* were had upon this mortgage, and in 1825 a judgment was obtained by default, and the mortgaged tenements purchased by Broadwell at sheriff's sale. The record of these proceedings is made a part of this bill, and the plaintiff insists that no valid service was made upon her, and that she was not a party. She therefore prays if the court hold the mortgage deed binding upon her, that she may be admitted to redeem the land in the hands of the representatives of Broadwell and of Sevier, who purchased with notice.

A supplemental bill avers that in 1833 the judgment in the *scire facias* was reversed on error since filling the original bill.

The acknowledgment of the deed is as follows: "State of Ohio, Hamilton county, ss. Before me, the undersigned, a justice of the peace, came Gabriel Hubbell, and Martha, his wife, who being made acquainted with the contents, and being examined separate and apart, acknowledged the above," etc.

The service of the *scire facias* is by the following indorsement upon it: "We hereby severally acknowledge service of the within writ, waiving all error as to the form of service thereof.

(Signed,) "G. HUBBELL,
MARTHA HUBBELL."

To this the sheriff added as follows: "*Scire feci*, as per acknowledgment on the back thereof." Signed by the sheriff.

The defendants demur.

Fox, for defendants:

The only question to be decided in the cause is, whether, after the reversal of a judgment of *scire facias* on a mortgage, the title to the property sold on said mortgage, can be affected by the reversal of the judgment?

*I suppose this question is decided by section 22 of the act [121 regulating judgments and executions, which declares that if any judgment shall be reversed, "such reversal shall not *affect* or *defeat the title to the purchaser* or purchasers;" and section 37 of the chancery practice act declares, that "the decree of either of the said courts, sitting as a court of chancery shall, from the time of their being pronounced, have the force, operation, and effect of a judgment at law."

These sections, I suppose, are decisive of the question, and such has been the construction put upon the statute by this court.

The purchaser, whoever he may be, is secure in his title against any errors of the court rendering the decree. No distinction is made, none ought to be made, as to the character of the purchaser. The object of the statute is to give credit to judicial sales; all the purchaser has to look to, is to see that the court had jurisdiction of the parties, and had rendered a judgment in the cause.

The object of the statute is to invite purchasers to bid, so as to insure competition. There is as much reason for encouraging the judgment-creditor to bid as any other person. It is the interest of the debtor to leave the whole field of competition open; that can not be done by making the purchase of the judgment-creditor more precarious than that of any other purchaser.

Our statute on this subject is only confirmatory of the settled practice in chancery where no such statute exists. 9 Ves. jr. 63–65; 12 Ib. 101–103; 2 Sch. & Lef. 578; 2 Caine's Cas. 262.

It was the same in sales of personal property on executions at

law, the reversal of the jugment never affected the title to the goods.

Since writing the foregoing, I have read Mr. Wright's argument. The positions he assumes are; 1. The original judgment on the *scire facias* was void; 2. That after the judgment was reversed, a right of action accrued in favor of Mrs. Hubbell, and consequently the mortgagee would have a right, in equity, to hold the land as a security for the original debt, and the mortgagee having this lien, it follows, as a matter of course, that a reciprocal right exists in the mortgagor to redeem.

As to the first position, I have only to remark, that whether the service was defective or not, is immaterial; the service was made by an officer competent to make it, and being in fact made, an irregularity of service could only be taken advantage of at the 122] *appearance term. There being no objection made to the service at the proper time, the law presumes the objection was waived, and the judgment remains good.

The right of Mrs. Hubbell to redeem, must depend upon the effect of the reversal of the judgment after Hubbell's death. For surely it can not be pretended that, so long as the judgment remained in force, a right of redemption existed. That judgment, while in force, was a bar to foreclosure by express statute. The statute also declares, that the property sold on a judgment shall not be affected by the reversal of that judgment. But Mr. Wright appears to think that there are special circumstances attending this case that will enable the court to wink at the statute, or avoid it. I see no possible way in which this court can permit the complainant to redeem, unless by a virtual repeal of the statute referred to. As to the reversal of a decree of foreclosure reviving the right to redeem in England, it can not affect the case. And another answer is readily given, which is, that the chancellor in England will always open a decree of foreclosure at almost any period of time. So if the party sues on the bond at law, the foreclosure is by that act opened. But no case can be found in England, where the reversal of a decree for the sale of mortgaged premises, affects a sale made while the decree was in force.

I perceive no difficulty to the setting off a debt to a claim on a *scire facias* on a mortgage. This court held such a debt could be set off to the extent of the amount due on the mortgage, in the case of Piatt *v.* St. Clair.

WRIGHT and HODGES, for complainant:

1. The complainant insists, in the first place, that her estate in the land is not bound by the mortgage; nor by the judgment in *scire facias* thereon.

The mortgage is made an exhibit in the bill, and it is submitted to the court, without argument, whether it is so executed as to bind the wife's estate.

The bill avers, that in the *scire facias* suit there was no legal service on the present complainant, and there was no appearance by herself or husband. The facts in detail are, that there was indorsed on the writ of *scire facias* as follows: "We hereby severally acknowledge service of the within writ, waiving all error as to the form of service thereof. G. Hubbell, Martha *Hub- [123 bell." To which the sheriff added his return, "*scire feci*, as per acknowledgment on the back hereof." The judgment was entered by default without appearance.

The law required the service to be made in the presence of two freeholders in special form. We insist that a married woman, being not competent to make any agreement, can not acknowledge service, and this must stand as no service at all; and the judgment being without service of process, as to the wife, must stand as no judgment against her. If so, it can not operate to prejudice her right to redeem.

2. In the second place, if the complainant's estate is bound by the mortgage and judgment, then she insists that the land shall be sold to satisfy the mortgage debt, or that she shall be let in to redeem, after ascertaining the amount due on the mortgage.

We claim this under the peculiar nature and effect of the proceedings in *scire facias*, and the circumstances of this case. Had the land been sold by Samuel Broadwell, I suppose we could not reach it; but while it remains in the hands of the mortgagee, I contend that the same equity remains between him and the mortgagor as before the sale under the *scire facias*. This arises from the necessary operation of proceedings in *scire facias*, under our old law.

After the sheriff's sale under the *scire facias*, proceedings at law against the land are exhausted; if the judgment be then reversed, the suit can not be remanded for further proceedings, because further proceedings could only result in an award of execution to sell the land, and this is already done. The defendant then brings his

suit to recover back the money, and a recovery is matter of course, on the reversal of the judgment. At this stage of the proceedings, what are the equitable rights of the mortgagee? If the debt is really due to him, he ought not to be compelled to pay back the money to the mortgagor. In some cases, where there is no separate obligation, and no covenant for payment of the money in the mortgage, there can be no recourse against the person of the mortgagor, and then the mortgagee loses his debt utterly. But if there is personal recourse against the mortgagor, still the mortgagee ought not to be driven to that personal recourse only, and be deprived of the benefit of the special security of the land, or the proceeds of it. It is clearly the justice of the case, that the mortgagee should retain his security, after the reversal of the judgment. The land has been specifically pledged, and no act of 124] the court, no casualty, ought to destroy *the hold on that security, as between the original parties. If the land is gone, the fund itself should be laid hold of, in place of the land out of which it proceeded. Suppose a contrary principle to be adopted; the land has been sold under the *scire facias* for its full value, the amount credited on the *scire facias* judgment, and then the judgment is reversed, and the mortgagor recovers back the money and becomes insolvent; or he has previously become insolvent, and has assigned the claim, and his suit is prosecuted for the use of the assignee; or, as in the present case, the wife, to whom the land belongs, and who, of course, can alone recover the money, is not liable for the mortgage debt; in all these cases the mortgagee loses his debt totally, unless some principle of equity be established securing to him the benefit of his lien as it stood before the *scire facias* sale.

It has been argued that the mortgagee may set off his mortgage debt against the *scire facias* for restoration of the money, and thus obtain a benefit equivalent to his original security; but the difficulty arises of making a set-off at all, in such case. I have understood the decisions of our courts to be that our statute does not allow a set-off in such a *scire facias*. But suppose it did, it is obvious, from the cases supposed above, and others that might be suggested, that the set-off would not be a general remedy; in many cases it could not apply; there must, therefore, be some principle of equity which will do justice in all cases. What is this principle of equity? I hold it to be the following: After the

sale on the *scire facias*, the equity of the mortgagee is, that he should still retain security for his debt; he can not retain the security, unless by still treating his claim as the original mortgage debt; if so treated, the mortgagor has still the right to redeem; if one side has the equitable right to be secured out of the pledge or its proceeds, the other must have an equal right to redeem the pledge; so long as the idea of a debt and a pledge remain, the idea of redemption must remain; and these rights grow out of the original relations of the mortgagor and mortgagee, and attach on the original debt with its rights and incidents. These are clearly the equitable rights as between the mortgagor and mortgagee personally. So long as the land remains in the hands of the mortgagee, these equities attach on the land itself; if the mortgagee has sold the land, these equities are defeated by the paramount legal rights of the grantee; but as between the original parties, whatever is equity between them, in relation to the land, is equity as against the land; and the consequence *must [125 be that the mortgagor has a right to redeem the land by paying the debt.

Is there anything in our statute interfering with such a principle of equity? The statute provides that a reversal shall not "affect or defeat" the title made by the sheriff. On the grounds which I assume, I do not conflict with this provision; the title remains unimpeachable at law, a valid legal title; still, such personal equities arise out of the special circumstances in relation to the land, that this court may decree it sold or redeemed to satisfy those equities.

To test this case, let us transpose the parties; suppose the mortgagee was seeking to avoid paying back the money, in a case where certainly he could not defend himself by set-off, what relief could equity give him? They certainly could not enjoin the suit when it was prosecuted by or for one not liable for the mortgage debt; and what other possible equity could the mortgagee allege? Surely none but the equitable right to have the debt still satisfied out of the land; he can not set up the debt against the mortgagor personally, so as to be available for his protection; and the only other alternative is to set it up against the land, and this he can do only as a mortgage debt against the land. If he hold the land and pays back the money, he gets nothing toward payment of the debt; and still, if I mortgage my land for another man's debt, that debt ought

to be made out of the land. After reversal of a judgment, the general principle is, that the parties should stand in the same situation as before the judgment. Their rights stand unadjudicated, but still unprejudiced, so far as may be without affecting the rights of third persons, acquired on the faith of the judgment. The judgment being reversed, the existence of any debt is unknown to the court, because unascertained. Suppose it should turn out, on investigation, that no debt whatever was due to the mortgagee. Can it be doubted that the land ought, in equity, to be restored to the mortgagor as against the mortgagee? And this is *prima facie*, the situation of every such case before the court, after reversal, until the existence of a debt is judicially ascertained.

If the mortgagee has an equity to have his debt secured to him out of the land after the reversal, the mortgagor must of course have the reciprocal right to redeem.

Under the English equity practice of a technical foreclosure, a reversal of the decree would of course open the foreclosure; and many other acts of the mortgagee have that effect, such as suing 126] on *the bond, etc. But if the mortgagee had sold the property after the decree of foreclosure, the title of his vendee remained perfect and absolute, and not affected by anything which would otherwise have opened the foreclosure. 3 Pow. Mort. 1006.

There are various cases where a distinction is made between cases when a party to the suit is purchaser, and when a stranger is purchaser after judgment reversed, protecting the stranger but not the party. These, however, are not decisive authority, because it is here a statutory matter. The right to redeem arises from the position in which the statutory proceeding leaves the parties after reversal. The debt, if one exists, must be regarded not merely as a debt, but a *mortgage* debt, entitled to a special privilege against the proceeds of the property, and it can not be so regarded without allowing the right of redemption.

In the present case, Mrs. Hubbell is clearly not liable for the mortgage debt. The mortgage, if valid against her, can have no other effect than merely to bind her land for the amount due when that shall be ascertained. The judgment being reversed, she has a clear right to have restitution of the money made out of her property, by virtue of the reversed judgment. Against this right to restitution, the administrators of Broadwell can not set up, by way of set-off, a debt due them from her deceased husband. That is no

debt of hers. The only defense they can make must be to file their bill in equity, and allege that they had a lien on her land, of which they ought, in good conscience, to have the benefit. Let it be especially noted that their *lien on the land* is the only foundation they can allege for their equity. Now can it for a moment be admitted that while they hold *the title of the land* and insist on retaining the entire title, they can set up a mere lien upon it in equity, as a bar against restitution of the money? The lien can give them no further equity than to have the debt satisfied out of the thing bound by it. So long, therefore, as they hold the land, and it remains in the power of the court to give them the ordinary remedy, that is, to sell so much of the thing pledged as will satisfy the debt, they can not ask any other relief. If they are entitled to such relief, it must be on a principle of equity, of which either party may claim the benefit in the first instance. This principle is simply that, in equity, all the defendants' right in the land is their lien for their debt; and this debt we must have a right to compel them to take, and leave to us the residue of the land. If this be not the equity between the parties, then we must have a restitution of the money at law; the defendants *hold the lands of Mrs. Hub- [127 bell and must look to the insolvent estate of her husband for their mortgage debt, if they have any. If the land had greatly depreciated in value, this would seem to them a very hard case, and probably would quicken their perceptions of the equity of the positions we maintain.

Judge LANE delivered the opinion of the court:

The acknowledgment of the deed, although slovenly, is well enough. It admits no sensible interpretation, except that which shows the essential requisites of the law were complied with.

It is not intended now to decide, whether a judgment, against a married woman, entered upon her written acknowledgment of service, and agreement to waive error, be void or voidable. The reversal of the judgment in *scire facias* renders it unnecessary at this time.

The demurrant principally relies upon the new rights, acquired by the sale. Without denying that the judgment of restitution on the reversal, restores the plaintiff, in most respects, to her original situation, he insists that the act regulating judgments and executions, 29 Stat. 107, sec. 22, which declares that the reversal

of a judgment shall not the affect the title of a purchaser, protects his title to the lands upon him. It is the settled policy of the court to protect judicial sales. Where lands have passed, by a sale under execution, to a stranger to the judgment, the statute compels the owner of the land, on reversal, to pursue the fruits of the sale, in the hands of his antagonist. But when a party to the judgment purchases and continues to hold, this rule does not apply with the same force. The purchaser is a party to the errors, and it seems most consonant with justice to restore the land itself to its original owner, where it remains between the original parties, and within reach of the court, no new rights intervening. 3 Pow. Mort. 1006. In the present case, where the right of redemption is restored by the reversal, it seems just to attach it to the lands, to which it was originally annexed, rather than to the ideal money produced by the sale.

Decree permitting redemption of lands in the hands of Broadwell's heirs.

128] *Lessee of Jer. Armstrong v. John McCoy.

Where there has been a sale of real estate upon execution, and an order for a deed, these proceedings lay the foundation to admit parol testimony that a deed was executed and delivered.

Where a sheriff's deed recites so much of the executions and other proceedings, as shows a clear and undoubted authority for its execution, such recitals are sufficient.

This cause was adjourned from the county of Franklin. it was an ejectment, to be determined upon proofs involving naked questions of fact and law.

The plaintiff laid two demises and claimed under two distinct chains of title, derived from two different sources, both of which were judgments and executions against the same defendant.

The first chain of title was deduced from a judgment, West v. McCoy, in Franklin county. The proof consisted of the judgment, execution, levy, sale, confirmation, and the order that the deed to the purchaser be made, with the deposition of the person who officiated as sheriff, in making the sale, to this effect.

"That in executing deeds, as sheriff, it was his uniform habit to

have such deeds acknowledged and attested by two witnesses; that, in this case, he has no doubt that a paper purporting to be a deed, was given to the purchaser, and none, that the deed was properly acknowledged and witnessed. The witness had an impression that it was in his own store that he delivered the deed to the purchaser."

The purchaser was James Conger. The proof farther showed that McCoy, whose title Conger purchased, had been in possession many years, perhaps twenty or more. That soon after the sheriff's sale, Conger went into possession, and held it two or three years. That, in the spring of 1834, Conger ran away and abandoned the possession, upon which McCoy again entered into it, and continued to hold.

The second, or continuous chain of title, was founded upon a judgment against Conger, execution upon which was levied on the land in question, McCoy being in possession, at the time of the levy. A sale on the execution and levy was perfected, and C. Fox became the purchaser. In making the deed to Fox, the sheriff failed to recite all the writs of execution, that had issued as the foundation of the sale. After issue joined, on this fact, a second deed was made to Fox, containing these recitals. Fox had conveyed to the lessor of the plaintiff.

WILCOX, for the plaintiff:

The proofs are believed to be sufficient *prima facie* evidence of the existence of the sheriff's deed to Conger. The proof *might be more *conclusive*, were it not left to inference [129 that McCoy, soon after Conger left the country, for the first time discovered that the deed was not on record, and *therefore*, he retook the possession.

It is a presumption of law, that every officer does his duty.

The non-recital of the executions does not vitiate the sheriff's deed to Fox.

The statute is merely *directory*. Lessee of Allen *v.* Parish, 3 Ohio, 187.

This objection is removed by second deed, which is admissible by relation. 3 Cowen, 75, and cases there cited.

Admitting the objections thus far taken to be valid, the plaintiff insists upon a recovery on other grounds.

McCoy had been in the possession for many years. There was a *valid sale* of the premises to Conger. The sale was *confirmed*

and a deed *ordered*. Shortly after the sale, Conger is found in the quiet possession of the premises, which he continues to hold undisturbed for more than four years, when he left the country to avoid his creditors. Upon this state of facts, supposing no deed to have been actually made, the law will presume that McCoy peaceably surrendered up the possession to Conger, who had a right to the premises, because he had bought them, and had paid his money for them, and which money was applied to McCoy's debts. By this surrender of the possession, Conger acquired a *right to the possession*, such as could not be defeated by the subsequent *bare entry* of McCoy. Conger being thus in the *actual possession*, and having in him the *right of possession*, the execution from Hamilton county is levied upon the premises, and, by the subsequent sale, the right of Conger passed into Fox, and from Fox to Armstrong, the lessor of the plaintiff. The principle is analogous to that of Maynard's Lessee *v.* Cable, before Judges Collett, Lane, and Wright. Wright, 18.

Admitting further, that both the deeds to Fox, by the sheriff, are void, still the plaintiff may well recover on the demise to Conger. The surrender of McCoy to Conger gave to Conger the *right of possession*, which, as above stated, could not be defeated by the subsequent bare entry of McCoy, which was tortious. The sale, by the sheriff, to Fox, not passing anything, by reason of the invalidity of the deed, this *right of possession*, acquired by the voluntary surrender of McCoy, is still vested in Conger, and on his demise is sufficient to recover the possession *against McCoy*, whose entry and possession are tortious.

130] *G. Swan, for defendant:

The first question that arises in this case is, whether a sheriff's deed is effective as a conveyance when only one of many executions is recited in it. The statute, vol. xxix, 105, sec. 16, declares, that "sheriffs' deeds shall recite the execution or executions, or the substance thereof, the names of the parties, the kind of action, the amount, date of the term, etc., *and shall be acknowledged*," *etc.* These recitals appear to be as necessary to the validity of the conveyance as the "acknowledgment;" and if courts may dispense with the recitals as directory, there seems to be no reason why the acknowledgment might not be treated in the same manner. We deem this point worthy of consideration by the court, as one frequently arising, and which has never been adjudged in a manner that may

be a guide to the profession, while we entertain doubts whether such recitals should be taken as directory to the officer and not essential to the validity of the conveyance. The plaintiff has treated the question as important, and has, since the commencement of the suit, attempted to strengthen his grip by procuring another deed under the sale upon Conger's mortgage to Matthew and Hopkins, with all the recitals required by statute; but as the title accrued after action, it can not be used. 3 Bibb, 297; 3 Marsh. (Ky.) 134; Till. Adams, 189.

But we depend principally for the defendant upon the insufficiency of proof as to the execution of the deed asserted to have been made to Conger by the sheriff. It is a well-settled principle, that after laying the foundation for the admission of secondary evidence, the party must prove the execution of the original and lost instrument, in precisely the same manner as if the same were present. 1 Starke's Equity, 303. When sufficient evidence is given of the loss of the deed, its execution must be proved according to the nature of the instrument; if a deed, by subscribing witness, or proof of his handwriting, if he be dead, or that of the obligor if the deed be not attested. So if a note be lost. 1 Atk. 446.

The law is laid down stronger in 1 Saund. Pl. and Ev. 517, 518. When a party asserts the execution of a deed, he must prove the same, and all the requisites attending its execution. The sealing and delivery must be proved by a third person, if no subscribing witness, and by such subscribing witness if there is one. Authorities might be multiplied to this point, but it is supposed enough has been cited to satisfy the court, that the point *taken is well established. Deeds of conveyance, in this [131 state, must be signed and sealed by the grantors, in the presence of two witnesses, who shall attest such signing and sealing, and must be acknowledged before a judge, etc. 29 Ohio L. 347. If the deed under consideration had no subscribing witnesses, it is not valid as a legal conveyance and can not sustain the action of ejectment as against a stranger. This principle is too clear to require authorities to support it. If there were attesting witnesses, they, or one of them, must be produced, or it must be shown that they are absent or dead. The authorities cited show this; and, indeed, all our adjudged cases have been that such witnesses are the best evidence. Then this alleged conveyance from

the sheriff to Conger, either had, or had not, subscribing witnessess. If it had not, the deed can not avail as a conveyance to defeat the possession of the defendant; if it *had*, then such witnesses, or one of them, must be produced, or their absence accounted for. The testimony of the grantor is, "that if there were subscribing witnesses, he does not recollect who they were, nor does he recollect whether there were any—does not recollect, if it was acknowledged, before whom such acknowledgment was taken." To obviate this evident deficiency in the proof, the witness is cross-examined to make out evidence of the due execution by "*travit*." This mode of proving the execution of a solemn instrument upon which land titles depend, comes under some head of evidence which has escaped the research of counsel. Indeed, the witness has no distinct recollection, which, if competent, would enable a jury to find any one of the great essentials which give validity to a deed of conveyance. He neither recollects the signing, sealing, acknowledging, nor even the delivery of the deed to Conger. Has this court any proof that there were two, or even one, attesting witness to the deed? Is there evidence of acknowledgment? The whole testimony is deficient, even if it were not secondary, and for that reason inadmissible. We say, with confidence, the existence of the deed as a conveyance is not proven; and if it were, it is not by that primary evidence that the usages of law require. The law so abhors parol evidence, that the doctrine is quite recent which allows it to be used when deeds are lost. Sir Edward Seymour's case, 10 Mod. 8. The court were of opinion, that when a deed was lost, you might prove by copy, but the contents could not be proved by those who knew the deed. The rule, although enlarged in modern times, is still applied with great caution. In 1 132] Car. & P. *282; 11 Eng. C. L. 394, the court held, that when a letter was sent by a father to a daughter, and the son and daughter searched for it, the son could not be a witness, and the party was nonsuited because the daughter was not present. The plaintiff, then, has no ground to recover upon his paper title.

It is urged by the plaintiff, that he has a right to recover upon the ground of priority of possession, or upon the sale and confirmation to Conger, in whose name there is a demise in the declaration, Upon the subject of possession, the witness simply proves that McCoy had been in for many years, that Conger then got possession and afterward adandoned it. How this possession

was obtained by Conger, the witness does not know, and he is equally ignorant in what manner McCoy re-entered. Upon this part of the case, we have evidence of a naked possessory title, without any higher claim by either, and it was settled that the eldest possession, or the actual possession, must prevail, where there is no superior title. 10 Johns. 338; 5 Litt. 319; 7 Ohio, 146.

There is no evidence that Conger entered adversely to McCoy; the fair presumption is, that he either entered under McCoy or in his own wrong, and this is fortified by the fact, that he either voluntarily abandoned the premises or peaceably surrendered them to the prior possessor. In either case, the action can not be sustained upon Conger's demise. If Conger abandoned the possession, the entry of McCoy can not be taken as tortious as to him. Having a more naked possession, and abandoning that, he gave up all claim to the premises. The evidence does not show that he entered at all under color, or claim of title; nor does it appear whether the last entry of McCoy was other than upon vacant premises. The actual possessor has title against all the world, except the legal owner, or when he has committed an actual ouster of a prior possessor. In any possible view of this part of the case, the plaintiff shows no right to recover, upon the title of possession by Conger. Did Conger's possession gain anything by the levy of the execution, the sale, and confirmation? This court determined, in the case of Reynolds v. Rogers, 5 Ohio, 174, that neither a levy upon land, or a sale and conveyance, effects a transfer of possession. This question is ably examined by Kent. 8 Johns. 548–550. The issuing a *fi. fa.* is to give effect to the levy. Sale, and all other legal requisites, will not constitute a conveyance, but at most *a contract* for a conveyance. Ib. 550. We confidently expect a judgment for the defendant.

*Wilcox, in reply: [133

By looking at the sheriff's deed to Fox, it will be seen that it recites correctly the names of the parties, the kind of action, the amount and date of the judgment, and the execution, by virtue of which the levy was made. The *vendi.*, upon which the sale was made, is not recited. It is, however, presented to the court, and the sale, in every respect, is in conformity with the law. The power exists, and has been well executed. In such cases it is a familiar principle that misrecital, or non-recital, will not vitiate. Indeed, the counsel for the defendant do not seem to press the

point. If the authority cited in the opening, 3 Cowen, 75, be good law, the objection seems entirely removed upon the principle of relation, and that authority seems not to be questioned.

The case was supposed to be submitted to the court, in the county, *mainly* upon questions of "law." The principal question now made seems to be a matter of "fact," in regard to which, it would seem, that argument can be of little use. Most that can be said on the part of the plaintiff is, that it is believed the evidence is, *prima facie*, sufficient to entitle him to a verdict of a jury. This part of the case seems to have been decided by this court in the ejectment case from Richland county, in which the opinion of the court was delivered by Judge Hitchcock, on Monday morning, the 11th instant. A case in point, also, is Jackson *v.* Woolsey, 11 Johns. 446. There had been a partition, and the court had ordered two commissioners to make a deed. An action of ejectment was subsequently brought, in which the existence and due execution of this deed was made a question. Neither the original nor a copy was produced. One of the commissioners testified "that the farm was sold to Gillespy; that he had not a positive recollection of executing a deed, but had not the least doubt that he and Denniston, another commissioner, since dead, gave the deed, and was certain that a deed must have been executed, though he had now no remembrance of the fact." Wilkin, the attorney, testified "that he wrote a deed to be signed by the commissioners, and the draft of which he had." There was no evidence whatever that the deed was ever *sealed*, or *witnessed*, or *acknowledged*. The court say "the circumstances of this case would warrant a jury to presume that the deed alleged to have been given by the commissioners had been duly executed by them in pursuance of the order of the court of common pleas, and if so, this court are bound to presume it." Ib. 456.

134] *The circumstances of the case before the court are peculiar. Conger purchased the premises at sheriff's sale, and went into possession. He did not record his deed. While he is thus in possession judgment is rendered against Conger, and a levy made on the premises, under which the present plaintiff claims. Before the sale Conger runs away, insolvent, and carries with him his unrecorded deed, and goes to parts unknown. In the meantime the defendant enters without any apparent right. The sale is made to Fox. Now, it is submitted that under these circum-

stances the plaintiff has made out a strong *prima facie* case for a jury.

The sale of Conger was a valid one.

He paid the consideration money.

The sale was confirmed, and a deed ordered by the court.

It was the *duty* and for the *interest* of the sheriff to make the deed.

It was for the *interest* of Conger to receive a deed.

It is easy to conceive why a man, in failing circumstances, should not put his deed on record.

Soon after the sale Conger went into possession.

The sheriff, who made the sale, testifies that he has no doubt but that he gave a deed to Conger duly witnessed and acknowledged, and thinks he gave it to Conger in his store.

The defendant has received the pay for his land, gave up the possession till Conger ran away, and then entered in his own wrong, and is now enjoying the land, and the money, too, which Conger paid for it. May we not insist that this, to a jury, would be presumptive evidence of the existence of a deed to Conger?

The counsel for the defendant do not seem to meet the argument in regard to the possession. It is not a case of *priority* of possession. For the purposes of this argument, a *legal paper* title may be admitted in McCoy. The point, then, is this: There was a valid sale on execution; the purchase money was paid, and the proof in the cause raises a legal presumption that McCoy voluntarily surrendered the possession to Conger. It is tantamount to a *contract* of sale in which the possession is delivered to the vendee. This gives a right of possession to Conger, which can not be defeated, by the subsequent entry of McCoy, without right. The proof in the cause shows that Conger left the country to avoid his creditors. This did not affect his *right* of *possession;* that he carried with him, unless it was divested by the sheriff's sale to Fox. It is not pretended that the sale, confirmation, etc., *per se*, gave any title, or even any **right*, to the *possession*, but they did constitute a good con- [135 sideration for the delivery up of the possession to Conger; and Conger having thus acquired the *actual* possession, he has a *right* to the *possession* as against the subsequent tortious entry of McCoy, or rather that right has passed by the sheriff's sale to Fox. This seems to be exactly the doctrine contained in the last

sentence of Judge Swan's argument. I can not find the case, but admit it to be good law, and hope the court will give us the benefit of it.

Judge GRIMKE delivered the opinion of the court:

If the evidence in this case related to a deed from one individual to another, there would be some reason to doubt whether it was sufficient to show a legal title in Conger. But it is, in this instance, combined with other circumstances which contribute to raise a presumption, exceedingly strong, that such a deed was actually executed. A distinction must be made between those cases where a deed, not produced, is the commencement and end of title, in an individual, and those where the deed, having for its foundation a train of judicial proceedings, is only the consummation of that title. In the first instance, the testimony to supply the production has no necessary connection with the deed; in the second, it may constitute the whole authority for its execution, and may be evidence of a higher nature than the deed itself. In this case, there is proof of the sale, of the return by the sheriff, of the order of confirmation, and that the sheriff made the deed. We think that these facts, connected with the testimony of the witnesses, are sufficient to authorize the presumption that a valid deed was made by the sheriff to Conger. This case is not stronger than that of Jackson v. Woolsey, cited by the counsel for the plaintiff. In that case it was decided that commissioners in partition, appointed to mak. a deed, might be presumed to have made one, pursuant to the order of the court. Nor is this case so strong as the case of Tyburr v. Slade, 4 Durnf. & East, 682, where, trustees having been directed to convey to a devisee, on his attaining twenty-one years, it was held that a conveyance might be presumed any time afterward.

It is objected, to the sheriff's deed to Fox, in the case against Conger, that it does not recite all the executions that issued upon the judgment before the sale was effected. This objection is not maintainable. All that is necessary is, that the deed show that the sheriff acted under the execution. This question has been repeatedly raised in New York, and it has been uniformly 136] *decided in favor of the sheriff's deed. 10 Johns. 381; 18 Johns. 7. It is true our statute declares that the executions shall be recited, and it is often very difficult to distinguish between

those ceremonies which are directory to the officer, and those which are essential to the title. If any one general rule may be laid down, it is, that every prerequisite which can be considered as constituting the foundation of title, is essential and indispensable, and that whatever does not partake of that character is merely directory. The word *recite* is used in the statute long after it had obtained a technical, legal meaning, when applied to deeds. I refer to the well-known maxim that a recital is not a neccessary part of a deed. But it is unnecessary to decide more than that the recital, which is contained in this deed, showing, as it does, a clear and undoubted authority for its execution, is sufficient. Judgment for the plaintiff.

SMITH A. TOWNER *v.* HENRY WELLS, WILLIAM TAYLOR, ET AL. ORIGINAL BILL.—WILLIAM TAYLOR *v.* SMITH A. TOWNER, HENRY WELLS ET AL. CROSS-BILL.

A feme covert is estopped by her covenant of warranty, in a deed duly executed and acknowledged, in the same cases and to the same extent that any other covenantor is estopped.

THESE two cases came before the court in the county of Licking. Without going into a statement of the matters contained in the bill, cross-bill, and answers, it is sufficient to say, that the objects of the several parties are to ascertain their respective rights growing out of sundry mortgages executed by, and judgments recovered against, the defendant, Henry Wells, to effect a sale of the mortgaged premises and a distribution of the avails of such sale. The facts of the case are fully stated in the opinion of the court.

The case was fully argued by DILLE & STANBERY, for Towner, and by H. STANBERY & HUNTER, for William Taylor.

Judge HITCHCOCK delivered the opinion of the court:

The material facts of this case are as follows:

1. On March 24, 1830, Henry Wells mortgaged to E. Buckingham, jr. & Co., four hundred and ninety-six acres of land, part of

section 2, township 2, range 10, in Licking county, to secure the payment of a promissory note of even date, in three months, for five hundred and twenty dollars seventy-eight cents. This mortgage was recorded on August 31, 1830, and remains unpaid and unsatisfied; two hundred and ninety-six acres of the tract thus 137] mortgaged *had been previously sold and conveyed by the mortgagor, and, of course, is not now in controversy.

2. At the October term, 1830, of the court of common pleas of Licking county, Taylor recovered a judgment against Henry Wells, for the sum of four thousand dollars, the penalty of the bond upon which the suit was brought, subject to an inquiry as to the amount due in equity. At the October term, 1831, on inquiry, execution was awarded for twelve hundred and six dollars and fourteen cents, the sum *then* due in equity; and on April 25, 1832, an execution issued, which, on the 29th day of the same month, was levied on lots Nos. 1, 2, 3, 32, 38, and 39, in the town of Licking, which town is situate on the two hundred acres covered by the mortgage from Wells to Buckingham & Co. The same execution was at the same time levied on thirty acres of land, west end of said two hundred acres. This levy remains undisposed of.

At the March term, 1833, of the same court, further breaches having been assigned by *scire facias*, a further execution was awarded for six hundred and forty-five dollars and eighty-seven cents, the sum then due in equity; and on the 25th day of April following, an execution was issued upon this award, and was levied on twenty-four lots in said town of Licking. Pursuant to this levy, said lots were sold on March 29, 1834, for two hundred and seventy-eight dollars and thirty-one cents, of which thirty-eight dollars and thirty-one cents was applied to the costs, and two hundred and forty dollars to the debt of the execution.

3. On January 13, 1831, Wells executed to Smith & Towner a mortgage on the same two hundred acres, covered by the previous mortgage of Buckingham & Co., excepting the town of Licking above named. This mortgage was to secure the payment of four several promissory notes, of even date, amounting together to sixteen hundred and seventy-one dollars.

At the October term, 1831, of the court of common pleas of Licking county, Towner recovered against Wells a judgment, on two of the notes secured by said mortgage, for the sum of seven

hundred and forty-one dollars and twenty-one cents; and at the March term, 1832, he recovered a further judgment, on one other of said notes, for three hundred and forty-four dollars and thirty-one cents. On the 23d of March, executions issued on both these judgments, and on the 29th of April following, were levied on ninety-six acres of land, east end of said two hundred acres, covered by the mortgages of Buckingham & Co., and of Towner. This land, however, has not been sold, although the levy has been kept good.

At the June term, of the same court, 1832, Towner recovered a further judgment, on the remaining note, for three hundred and forty-eight dollars; and *on April 25, 1833, an execution [138 was issued on this judgment. This execution was levied on June 29, 1833, on seventy acres, west end of said two hundred acres, excluding the town of Licking, and the ninety-six acres before levied upon by Towner, but including the thirty acres previously levied upon by Taylor.

4. At the October term, 1832, on a bill to foreclose his mortgage (to which neither Taylor nor Buckingham & Co. were parties), Towner obtained a decree for the sale of the two hundred acres covered by his mortgage, pursuant to which decree, the sale was afterward made to himself for eighteen hundred and one dollars and fifty cents, but this sale has never been confirmed by the court.

5. In 1833, William Taylor purchased in the mortgage of E. Buckingham, jr. & Co., and took an assignment of it.

After the original bill of Towner was filed, he assigned his interest to Avery and P. W. Taylor, who have instituted a supplemental bill, setting forth the assignment to them, and alleging that they have offered to redeem the Buckingham mortgage from William Taylor, which he refused to permit them to do, claiming the right to *tack his* judgment to this mortgage, and thereby to secure himself.

There are other facts in the case, but these are all that is material to state. There are also other judgment creditors, but it is unnecessary to go into an examination of their liens, as such examination can not, in any shape, affect the main point decided.

It is insisted by William Taylor, in his cross-bill, that he is entitled, as assignee of Buckingham & Co., to *tack* his judgment to their mortgage, and thus exclude the intervening mortgage and

judgment of Towner. This point, however, is not insisted upon by his counsel; and, with their usual candor, they admit the authorities are against them. This principle of *tacking*, it is believed, was never recognized in this state, and so long as regard is paid to natural justice, I apprehend it never will be. Our statutes have prescribed for us rules, with respect to the priority of liens, and by them we must be governed.

There is no controversy but that the mortgage to E. Buckingham, jr. & Co. is the elder and better lien upon the land in controversy, and must be first satisfied. It was executed March 24, 1830, and is now the property of William Taylor.

The mortgage to Towner was executed in January, 1831, and must be next satisfied, unless postponed to the judgment recovered by William Taylor in October of the preceding year. It is necessary, then, to ascertain the character of this judgment, and 139] *settle the question, whether it operated as a lien from the time of its rendition, or only from the time of the several executions awarded. This is the principal question argued by counsel, and when disposed of, there does not seem to be any further difficulty in the case. If this judgment was a lien from the time of its rendition, although no execution was sued out, within the year after it was rendered, and therefore could not operate to the prejudice of subsequent *bona fide* judgment creditors, still it would operate to the prejudice of subsequent purchasers.

This judgment is upon a bond for the performance of collateral conditions, and is for the penalty of four thousand dollars. It was not a judgment, however, upon which execution could issue, but was rendered subject to a subsequent inquiry as to the amount due in equity. This inquiry was had in October, 1831, and an execution awarded for one thousand two hundred and six dollars and fourteen cents. Whether this sum was actually due, or whether anything was due, in October, 1830, does not appear, but this much was in equity due in 1831. The proceeding was under the practice act of February 18, 1834, which authorized the court, where suit was brought "upon any bond, or other contract in writing, for the recovery of any forfeiture or penalty, or for the non-performance of any contract, or other agreement, contained in such bond, or other contract in writing," etc., to give judgment for the penalty of the bond, and to award execution for the amount of damages assessed by a jury, or for the sum due in equity, ac-

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cording to the nature of the case, together with costs of suit. And it was further provided, that the judgment for the penalty should stand "*as security*" for any further breaches that might subsequently happen of "such covenants, agreements, or conditions," etc. 2 Chase's Stat. 1268. It seems to be supposed, that as this judgment for the penalty of the bond is to remain as "*a security*" for any further breaches, etc., therefore that it must operate as a lien. I do not so understand it. The only effect of the whole provision is, to empower a person, who is the obligee of a penal bond, for the performance of collateral conditions, to commence his action when only a part of the conditions shall have been broken, and have execution so far as he has sustained injury. But if afterward he sustains further injury by the breach of other conditions of the contract, he may have further execution and satisfaction.

A judgment, *of itself*, does not confer any rights upon the creditor over the estate of the debtor. It is not, *ex vi termini*, any lien upon his estate; it is evidence of a right which may be *enforced [140 by execution; but the right itself existed previously. Whether it shall operate as a lien, and to what extent, is the proper subject of legislative enactment.

The act of February 4, 1824, "regulating judgments and executions," 3 Chase's Stat. 129, was in force when this judgment for four thousand dollars was rendered. In section 2, it is enacted, "that the lands and tenements of the debtor shall be bound for the satisfaction of *any judgment* against such debtor, from the first day of the term at which judgment shall be rendered, in all cases where such lands lie in the county where the judgment is entered; and all other lands, as well as the goods and chattels, of the debtor, shall be bound from the time they are seized in execution." The term, "*any judgment*," is broad and comprehensive, and would include judgments of any and every description. Could this have been the intention of the legislature? It seems to me that an examination of the statute will show that it could not. Judgments are either interlocutory, or final, and either would be embraced in the words "*any judgment*." Still, generally speaking, upon an interlocutory judgment, an execution can not be issued. But in section 17, it is provided that no judgment "on which execution shall not have been taken out, and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other

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bona fide judgment creditor." Now, it can hardly be supposed that the legislature intended to deprive a man of his lien, when it was not in his power to enforce it. In truth, the contrary is manifested by this same section, where it is provided, that when the judgment is rendered in the Supreme Court, the year shall commence to run from the first day of the term of the court of common pleas to which the mandate for execution from the Supreme Court is directed. And, it is further expressly enacted, that "nothing in this section contained, shall be so construed as to defeat the lien of any judgment creditor, who shall fail to take out execution, and cause a levy to be made as herein provided, when such failure shall be occasioned by appeal, writ of error, injunction, or by a vacancy in the office of sheriff, or coroner, or the inability of such officer, until one year after such disability shall be removed."

From a review of the whole statute, and more particularly of section 17, I am led to the conclusion that the legislature, when 141] they speak, in the second section, of "*any judgment*," *intend any judgment which is final, and conclusive of the matters in controversy between the parties—of judgments, in pursuance of which the creditor may forthwith have execution.

What, then, is the character of the judgment recovered by William Taylor at the October term of the court of common pleas? Was it a final judgment? "Final judgments are such as at once put an end to the action." 3 Bl. Com. 398. This is not such a judgment. It did not put an end to the action. Further proceedings were necessary to be had before the rights of the parties could be ascertained, or before execution could be issued. It may properly be assimilated to a judgment, by default or on demurrer, where a subsequent inquiry of damages is necessary. Such judgments are merely interlocutory, and can not operate as liens upon the lands and tenements of a defendant. If we were to hold otherwise, it would follow that this judgment lost its lien before execution could be had upon it, because no execution was awarded until one year after judgment rendered.

In the opinion of the court, this judgment did not operate as a lien until execution was awarded, in October, 1831, and then only to the extent of the amount for which execution was so awarded. Previous to this period, the mortgage was executed to Towner, and constitutes a preferable lien.

Such being the opinion of the court, it is unnecessary to examine the other points made in the case, as to the effect of Towner's judgments, the executions upon those judgments having been levied upon the same lands covered by his mortgage.

A decree may be taken referring the case to a master, and directing the sale of the lands mortgaged, excepting those lots in the town of Licking, which have already been disposed of. In distributing the avails, the Buckingham mortgage must first be satisfied; next the mortgage to Towner; and the balance, if any, will be distributed among the several judgment creditors, according to their respective liens.

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*Robert B. Brown *v.* David Cutler and Frederick Bowers. [142

New matter introduced in the answer, and not responsive to the bill, must be proved, or it avails nothing.

This cause was adjourned from the county of Darke, and is principally a case of facts.

Judge Wood stated the case, and delivered the opinion of the court:

This cause is heard upon an original and supplemental bill, and the answer of the defendant, Bowers. Cutler has not answered. The complainant alleges that, May 28, 1834, he obtained a judgment against Cutler, before a justice of the peace, for seventy-two dollars and fifty-eight cents, with costs; that execution issued and was returned, no property found whereon to levy; that, in truth, the defendant owned no property subject to execution at law, but that he did own an equity of redemption in real estate; that on March 1, 1834, the complainant had sold and conveyed to Cutler the east half of the southeast quarter of section 1, township 10, range 1 east, in Darke county; that on the same day, Cutler mortgaged the same premises to the complainant, to secure one hundred dollars, part of the purchase money, payable March 1, 1835. The bill prays that Cutler's

equity of redemption in this mortgage may be sold to pay complainant's judgment.

The supplemental bill charges that after the original bill was filed, Cutler made a pretended sale of this equity to Bowers, who is made a party defendant, the object of which sale was to defeat the recovery of the complainant, of which intention Bowers was cognizant. And the bill prays that this conveyance may be decreed fraudulent, as against the complainant.

Bowers, in his answer, states that before the complainant filed his bill against Cutler, a contract had been made by Cutler with Bowers to mortgage the land to him, to secure a debt due from Cutler to Bowers. The contract, he thinks, was made in March, 1834, and in December, 1834, Cutler made his conveyance in fee, of which the debt to be secured by mortgage was, in part, the consideration. Bowers admits the mortgage from Cutler to the complainant, and claims that, at the time of answering, he is the owner and holder of that mortgage. The answer further alleges that before the sale to Cutler by complainant he had mortgaged the same lands to one Blakely, which mortgage was concealed from Cutler, and is still out, for one hundred and forty-six dollars 143] and twenty-three cents, which Bowers *would have to pay to perfect his title. All knowledge of the pendency of the complainant's bill, antecedent to the conveyance of December, 1834, from Cutler to Bowers, is denied, as is also all fraud.

There is a replication to this answer, and the case was submitted, without argument, upon the pleadings, exhibits, and depositions. Upon examining the subpena, it appeared not to have been served upon Cutler until May, 1835.

Two principal points arise in the case: 1. Had Bowers a prior equity, in virtue of the contract set up in his answer, as made with Cutler, in March, 1834? 2. Does the mortgage to Blackly subsist as a lien for a debt due from the complainant, which equity may deduct from the amount due to the complainant?

Upon the first point, it is sufficient to remark that the alleged contract of March, 1834, between Cutler and Bowers, and its consummation, in December, 1834, is new matter introduced in the answer, and responsive to no allegation in the bill. No proof is introduced in support of it, and consequently, according to the settled rule and practice of the court, it must be disregarded.

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On the second point, the proof is clear that Blakely's mortgage was satisfied, and the fact well known to Bowers.

The complainant, then, is entitled to the relief he seeks unless Bowers is a fair *bona fide* purchaser. Is he such, on the proofs in the case? Our opinion is otherwise. Various witnesses testify to the full knowledge of Bowers of the complainant's claim; and one witness proves the declaration of Bowers, that he meant to buy the land and keep the complainant from obtaining the amount of his judgment. A purchase with this intent, when the fact is ascertained, is void as against the creditor intended to be defrauded. The conveyance from Cutler to Bowers is in this predicament. It must be declared void, and the equity of redemption of Cutler subjected to the satisfaction of the complainant's judgment.

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*Devisees of David McCune *v.* House and Litch, Administrators. [144

Under the statute of Ohio, a duly executed written will can neither be wholly nor partially revoked by a subsequent nuncupative will.

This case was reserved in Gallia county.

It was an issue, out of chancery, to try the validity of a nuncupative will. The agreed case shows that David McCune, while domiciled in the island of Jamaica, made a written will there, by which he disposed of his entire estate, both real and personal. That he afterward emigrated to the United States, acquired a domicile in the town of Gallipolis, Ohio, and there made a nuncupative will, disposing of a part of the property which he had before bequeathed by the written will. The complainants claim under the written will; the defendants, under the verbal testament; and the case is submitted to the court, for them to determine whether this last testament revoked the prior written will made in the island of Jamaica.

Arius Nye, for the heirs of McCune.

Vinton & Nash, for House and Litch.

Grimke, J., delivered the opinion of the court:

The proposition which is submitted to the consideration of the

court, is whether a written will can be revoked by a subsequent nuncupative one. But as we have power to decide only cases and not questions, we must decide, not whether a will, but whether the will made in the island of Jamaica was revoked by the will executed at Gallipolis. And this form of stating and determining the proposition will not deprive the parties of any right to which they would otherwise be entitled. The written will makes a disposition of the whole estate of the testator, and if the verbal will is legal, it will revoke the former disposition of the personal property. It was once a contested question, whether a will of personalty should be executed according to the law of the testator's domicile or of the place where the goods are situated. It was always admitted, that in case of intestacy the law of the intestate's domicile must regulate the distribution of his personal property. But a distinction was attempted to be made between a presumed intention in the one case and an expressed one in the other; and it was supposed that it was only where a will is not expressed that the law of the domicile was raised up to execute a presumed will. But inasmuch as personal property
145] *has no locality but accompanies the person of the owner, the consequence necessarily is, that the voluntary disposition, as well as the distribution of it, must be governed exclusively by the law of the domicile. So that it is now received as a settled principle, that if a will of personalty is made in *a foreign country*, and then the testator changes his domicile, the will must be executed according to the law of the new domicile. 3 Merivale, 67. The written will of Mr. McCune, therefore, although made in the island of Jamaica, must be governed by the law of Ohio. There does not appear to be any objection to its validity on that ground, and thus is presented the single question, whether the subsequent nuncupative one has the power to revoke it.

In England, before the statute of frauds, a writen will might be revoked by a nuncupative testament, and it was in consequence of an atrocious conspiracy to set up a nuncupative will over a prior written one, that the glaring defect in the law came to be perceived, and that the statute was passed. The history of the transaction is given in a note to Matthews *v.* Warner, 4 Ves. 196. Mr. Cole, three years before his death, had made a written will, giving three thousand pounds to charitable uses. Mrs. Cole set up a nuncupative will, by which the whole estate was given to her. Upon the trial, it

appeared that most of the witnesses to this will were perjured, and that Mrs. Cole was guilty of subornation. And upon this occasion Lord Nottingham said, "I hope to see, one day, a law that no written will should be revoked but by writing." The next year the statute of frauds was passed. In England, then, a will of personalty, which need not be attested by witnesses, can not be revoked by a verbal testament.

Section 2 of our statute of 1831, directs that every will disposing of real or personal property shall be in writing, and attested by two witnesses. Section 5 declares that any last will and testament shall be revoked by cancellation, or by subsequent will or codicil made *as aforesaid.* Sections 11 and 12 authorize the making a nuncupative will. And thus, I believe, it will be found that we, in Ohio, have enacted the same salutary provision which is contained in the English statutes of frauds; though it must be remembered that there are much stronger reasons why such a law should be established here, than in Britain, as a will of personal property must here be attested by two witnesses. Section 5 of our act declares that a will revoking a former will shall be executed *as aforesaid.* The wills before spoken of are those of *real and personal es- [146 tate, and thus the statute, by necessary implication, or rather by a plain and expressed intention, has declared that such revoking will shall also be in writing and attested by two witnesses; for the clause which permits a nuncupative will to be made, is placed by itself and postponed to sections 11 and 12, so that the words as aforesaid, in section 5, can not, without confusing the whole arrangement of the testamentary clauses, be supposed to have any reference to sections 11 and 12. All our prior laws on this subject correspond with this view, and seem to have forbidden the revocation of a written by a nuncupative will. The act of 1808, in sections 1 and 2 declares how a written will shall be executed, but is not followed, as is the present law, by a section prescribing the manner of revocation. Section 3 directs how a nuncupative will shall be executed, and then provides that no such will shall revoke a written will. The act of 1808 is similar to the present statute. It declares how a will shall be revoked in a clause antecedent to that which gives power to make a nuncupative will. It omits section 3 of the act of 1805, because the manner of revocation being defined in another section, such a declaration became unnecessary and would have been supererogatory. In truth, there could

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not be any doubt about this matter, if it were not for a mere change in the arrangement of the sentences in these laws, which shows how important it is, in framing a new statute, not to indulge in any arbitrary change of even the form of an old one; since, if it does not lead to any ultimate difficulty, it is calculated to produce doubt, which should, as much as possible, be avoided.

There are very good reasons why an individual, he who has not yet executed a written will, should be permitted, under peculiar circumstances, to make a verbal one. But when he has already executed a written will with all the solemnities of the law, there are equally strong reasons why the revocation of it should be attended with the same solemnities. It is not in restraint of this free action; it is to protect him from a fraudulent conspiracy, very likely to take place, where he has already disposed of his property counter to the wishes of those who surround him. The frauds practiced in England gave rise to the enactment in the statute of frauds. The act of 1805 was framed in analogy to that law; and the act of 1831, with a design equally plain, has also forbidden the revocation of a written by a nuncupative will.

147] *Lessee of Samuel Reed v. William Marsh.

In executing surveys under the laws of the United States, the mere marking a corner by the surveyor establishes no boundary, but such marked corner is controlled by the actual division lines subsequently made, field notes of which are returned to the proper offices, and preserved according to law.

This is an action of ejectment reserved from the county of Scioto.

The defendant is proprietor of fractional section 6, in township 2, of range 21, entered in 1804, by Fullerton and Clapperton, patented to their assignees, Calhouse & Henderson, in 1812, and by them conveyed to him.

The plaintiff owns five hundred and fourteen acres, from the north side of fractional section 5, in the same township, which was entered by James Stump, April 13, 1813, assigned to the plaintiff, and patented to him in 1827. The point in litigation is the line

between sections 5 and 6. The corner maintained by the defendant is at an elm; the corner claimed by the plaintiff is at a box elder.

By the act of Congress of 1796, Swan's L. L. 35, the surveyor was directed to cause a survey of the territory, which includes this tract, to be made into townships six miles square, by lines running in the direction of the cardinal points; that alternate townships were to be subdivided into sections by running parallel lines, each way, through them, at distances of two miles; and each intermediate corner to be marked at the distance of one mile. By the statute of 1805, Swan's L. L. 51, the two-mile blocks, in these townships, were to be subdivided by straight lines, to be run from the corners marked in the first survey to the opposite corresponding corners. The corners marked are declared, by the statute, to be the proper corners of the sections. The boundary lines, actually run and marked, are established as their proper boundary lines.

In 1799, a deputy surveyor was sent to survey this district. He fixed the corner of the township, which is the northeast corner of section 5, and proceeded to run the line between townships numbered 2 and 3, which forms the north line of the two fractional sections, Nos. 5 and 6. In making his return to the principal surveyor, he describes a corner set in this line for sections 5 and 6, and likewise for sections 31 and 32, in township No. 3. This is the box elder corner. No line was run between sections 5 and 6, nor between sections 31 and 32, as this was the intermediate line between the exterior lines of the two-mile blocks. Before any further surveys were made, the entry of fractional section No. 6, now held by the defendant, was made in quantity three hundred and forty-five acres.

*In July, 1805, Denny, another deputy surveyor, was em- [148
ployed to make the subdivisions under the last-cited law. He run a random line between sections Nos. 31 and 32, in township 3, until it struck the township line; when, finding it fell one hundred and seventy-two poles east of the box elder corner, and left for section No. 6 less than eighty acres, instead of three hundred and forty-five, he suspected error in the position of the corner; and leaving his survey uncompleted, he set no corner posts for the quarter sections, as directed by the statute, but made a memorandum, in his field notes, of a provisional line only. He referred to

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the surveyor-general for instructions. Some delay seems to have occurred in this reference, but some time afterward Denny, his assistant, proceeded to complete the survey, and the line commencing on the north side of sections 31 and 32 was run south between them, and was extended over the township line and between sections Nos. 5 and 6, disregarding the box elder corner, and establishing the elm corner at the point of intersection.

Evidence was offered by the defendant, tending to show that the box elder was not intended by the surveyor, who made the first survey, to be a section corner, but that it was marked by his party in a drunken frolic, and that it has always borne the name of "the drunken corner;" that the elm has ever been regarded, in the neighborhood, as the true corner of the sections; the lands adjoining, as well sections 31 and 32, as sections 5 and 6, have ever been held in conformity with the last survey; that the plaintiff, in conveying the north part of section 5, recites in his deed recited that the elm is the true corner of his land.

The court instructed the jury that upon these facts the elm was the corner of these sections, and they returned a verdict for the defendant. The plaintiff makes this motion for a new trial for the alleged mistake of the law.

Mr. CLOUGH and Mr. SCOTT presented arguments for the plaintiff.

MURPHY, on the same side.

This motion is mainly founded upon a misdirection of the court to the jury, upon the trial, and involves: 1. A construction of the act of Congress of May 18, 1796, referred to in the argument of the Hon. S. F. Vinton and W. Leonard, for defendant. 2. The rule of evidence which ought to prevail in questions of boundary of lands, surveyed under the provisions of that act, and some other subsequent acts of Congress of like import.

149] *The miserable condition into which land titles in Virginia and Kentucky had been thrown by the loose and vague manner of making entries and executing surveys, in the early history of the country, whereby the title to lands often rested upon the uncertain memory of individuals, induced Congress, at an early day, to establish some mode of surveying the public lands, which might obviate these growing evils, and fix, not only a more certain and uniform boundary to lands, but also give to the government purchaser a more safe and permanent evidence of boundary

in the records of the county than he before had; and we humbly conceive that a just construction of the act of Congress of May 18, 1796, will not only effect the object, but entitle the plaintiff to a new trial in this case.

What, then, are its provisions? They are:

1. That a surveyor-general shall be appointed, with a salary of two thousand dollars per annum.

2. Field books to be returned by his deputies to his office, and there kept (not expunged). Fair plats to be returned to his office, and there recorded for *public information*.

3. He shall appoint *skillful* deputy *surveyors*, who shall survey the lands, *taking an oath*, etc.

4. The surveys to be made as follows:

1. By *north* and *south lines*, run according to the true *meridian*.

2. By other lines crossing them at right angles, so as to form townships of six miles square.

3. And that this rule should not be departed from, further than the particular circumstances of interference with rivers, Indian lands, or former surveys might demand.

4. The corners of townships to be marked with progressive numbers from the beginning.

5. Each distance of one mile, that is the mile line between the corners, is to be marked different from the corner.

6. To be subdivided into sections of six hundred and forty acres, or nearly so, by parallel lines from each two-mile corner, marking a corner on the parallel lines at the end of each mile.

7. And particularly, the sections are to be numbered.

8. Witness trees, near each corner, to be distinctly marked, showing the number of section and number of township.

9. Field books to show the description of corner tree, and its number.

10. All lines to be plainly marked.

*The surveys thus executed, and the field books, shall be [150 returned to the office of the surveyor-general, for the use and information of the public. But, according to the opinion of our antagonist counsel, these records are of no use, and give no certain information whatever.

Have we not a right to infer, from the great particularity of this act, that the national legislature intended to give a higher validity and more unquestionable authority to these vouchers,

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field books, and records, when thus executed, and returned by sworn officers of the law, than can be given in courts of law to the uncertain memory of individuals?

Is it not an alarming departure from the settled doctrine of courts of justice, to insist upon impeaching such public documents and records, made and kept by the sworn officers of the law, in strict conformity with their duty, by evidence of facts existing merely in parol, or by the acts of individuals not acting under the solemn sanction of the law?

May we not ask this honorable court to review the decision made by them, when refusing to charge the jury, that these solemn acts of record were the only legal evidence of title, not to be impeached by any act of any officer not acting under like solemn sanctions.

After the survey was made by Langham, under and in pursuance of the law of Congress of 1796, and after this survey had been returned, with the field books, and made, by the express provisions of the act, matter of record, upon which the subdivisions were thereafter to be made, what authority had the surveyor-general under that, or any subsequent act of Congress, to alter, or authorize others to alter, these *corners* and lines so made, established, and returned? Does the act of 1805 give this authority? It is contended that it does.

That act, so far from authorizing the surveyor-general or his deputies, to alter, amend, or abolish any one of the corners, or lines, made and returned under the act of 1796, positively recites what has been done under that act, and that recitation amounts to a legislative affirmation of the survey and corner in dispute. Mark the language of that act: "The surveyor-general shall cause all lands north of the river Ohio, which had been surveyed under the act of 1796, and were subdivided by running parallel lines through the townships, each way, at the end of every two miles, and by marking a corner on the lines at the end of each mile, to be subdivided into sections." Now, it is
151] plain, from this act, that if the land in dispute, and the contested corner, the box elder, had not been surveyed and fixed, before the passage of this act, the surveyor-general could derive no authority to subdivide it under this act; *i. e.*, if this land had not been previously run off by Langham, or some one else, as directed in the act of 1796, how could the surveyor-general have
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subdivided it under this act? Does not this act of 1805, by its very terms, refer to the survey made by Langdon, upon which we rely as conclusive evidence of our right? Is it not an express *legislative recognition* of this survey, under which we claim? Does it not expressly confine the subsequent action of the surveyor general, and his deputies, to a mere subdivision of the larger lots? Does it authorize him, or his deputy, to resurvey the larger divisions? Does it authorize them to remove, alter, or amend the lines or corners before made? Does this act not expressly say, that in making the subdivisions, the surveyor shall make the subdivisions by running straight lines from the corners before made? This box elder, it will be recollected, is not only a mile corner, but also a center corner for four sections; that is, it is not only a section, but a corner to four sections, made by Langham, between 31, 32, and 5 and 6. The survey made by Langham, under the act of 1796, would have been incomplete without this box elder corner. This box elder corner was made and returned by Langham, under the act of 1796; he was a sworn officer of the law, for that purpose appointed; and this survey made by him, and this box elder corner made by him, are returned and recorded as required by that act; and the act of 1805, passed by Congress, with these records and returns before them, is recognized in the act of 1805, referred to in express terms of recognition; and so far as the corners made by Langham are concerned, they are designated expressly as the points from and to which the subsequent surveyor shall start and run.

If the exact quantity, in each section, is to be a rule of evidence in determining the boundary, he is right; but surely he is not serious in this pointed reference.

If, then, the act of 1805, gave no authority to the surveyor general to alter the corners made by Langham, the court erred in refusing to give the instructions asked for by plaintiff's counsel.

But it is contended that this box elder corner varies some one or two hundred poles from the true line. Such is not the case, from the evidence, unless it is meant that the *course* gives the true line. *The true line* is the line made and marked by *Lang- [152
ham, and this corner is in that line. It is not, therefore, variant from the true line as marked out, however it may vary from the true course of the compass or meridian.

But, says one of the counsel, this "box elder" is the "drunken
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corner," as appealing to the legal bench. It was always called the "drunken corner." Well, be it so. Call it what you will, it is the "box elder" corner made by Langham, as the true corner, returned and recorded, and specially referred to with all other mile corners, in the act of 1805, by which the subsequent surveyors were to be governed in subdividing the land into sections. They shall, says the act, run from corner to corner; but it is urged that inasmuch as the subsequent surveyor, under the act of 1805, chose not to be governed by the act, the statute law of the land is made void, and the act of the surveyor, done in contravention of the law, is good and binding.

Again, it is said, the "box elder" corner was not made by Langham, the surveyor, but by his party, while in a drunken frolic; and such is the parol evidence by which the *records ordered by act of Congress to be kept for public information*, as evidence of our right to freehold estates, are to be expunged and made of no avail in courts of law. Such a doctrine would set the whole land at variance, and unsettle every title in the country.

If it be true, as is metaphysically contended, that the acts of all the different surveyors, on one tract of land, constitute the survey, "that the survey is the 'whole thing,' of which the surveyors are the parts, yet this does not prove that the record of their acts, or the record of the 'whole thing' is to be vacated by the acts of the parts; and what is worse still, by the parol evidence of those acts, in contravention of the record of their acts, or the record of the 'whole thing.'"

Counsel admits that the object of the act of 1796, was to close the door against questions of boundary; but in order to open the door again, he would have us believe that the act of 1805 was passed to authorize the surveyors to amend all former lines and corners, if they thought proper, and so to execute the work as to vary from the former records, and let in parol proof of what was, or what was not, the true corner of any given township, section, or quarter section; and such is the effect of the positions now assumed for the defendant by his learned counsel.

But the great mistake of the learned counsel, in his commentary upon the act of 1805, seems to consist in this—when that
153] *act directs the surveyor general to cause the lines subdividing the townships and sections to be run from one *corner* to the other corresponding *corner*, he forgets, or seems to forget, that

these *corners*, mentioned in the act, refer expressly to the *corners* made by Langham, and, consequently, to the "box elder," and argues that as the line was to be run, *ergo* a new corner was also to be made—that if the course of the compass, set under the act of 1805, did not hit the corner set up and marked under the act of 1796, *ergo* a new *corner* was to be made, and hence the counsel charges that plaintiff asks the court to establish a *line* which was *never* run. Now, the plaintiff asks the court no such thing; we ask the court to establish the *corner*, not the line. We say the court has nothing to do with the line; that the law made the corner the permanent object, which was in all future ages to determine the line; that the *corners*, being fixed by the *record*, can not be moved by parol; and that the act of 1805 only gave authority to run from *corner* to *corner*—not to demolish old *corners* made under the act of 1796.

We admit that the court has no power to make a record, nor have they any power to make a *corner* which was never *made* and *recorded;* much less have they authority to receive parol evidence to vary and contradict the record of the "box elder" corner made by the surveyor, under the act of 1796, in May, 1799.

The case cited from Judge Wright's reports can give no support to the position assumed by the counsel for defendant; that case related only to the subdivisions of former surveys, and the *lines* and *corners*, as between these subdivisions made under the act of 1805, is a very different question from the one under consideration. We show a complete record of a corner fixed by the act of 1796, surveyed in 1799, and entered before the passage of the act of 1805. Our *corner*, viz: the "box elder," was made, returned, and recorded by the authorized officer of the law, acting under oath, and we show the *record* thereof made and kept for *public use;* we show our survey of the land prior to the act of 1805, and we contend that the court erred in not charging the jury, as requested, upon this evidence of record. We rely that the act of 1805 gave no authority to alter the *corners* made, returned, and recorded under the act of 1796; but, on the contrary, that the act of 1805 expressly recognized these corners, and we say that no parol evidence is admissible to vary the record of the corner so established, or change the *corner* by any line or lines which may have been run; that parol evidence of *a line actually run, [154 variant from the *record corner*, is wholly inadmissible, and, if ad-

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mitted, would work incalculable mischief in this country, and would, moreover, defeat the admitted object of the act of 1796, and 1805 also; that the whole policy of the law is against the pretensions set up by defendant's counsel, and that his pretended "*record of a line*" is visionary and vain; that there is no such thing contemplated in either act of Congress as the "record of a line;" that no line trees are recorded or named in any part of the returns made by the surveyors, nor does the law require it; that the law only requires *corner trees* and witness trees to be noted and marked, returned and recorded; and that if a line tree, or trees, were recorded, it could avail nothing, as the law requires the lines to run from *corner* to *corner*. Nor does the patent or grant contain the line or lines of the land; it designates the ground granted as a section, or quarter section, and these sections, or quarter sections, are determined by the *corners*, marked and recorded, and not by the real or imaginary lines.

Mr. VINTON submitted an argument for the defendant.

LEONARD, on the same side:

The reasons assigned for a new trial in this case are all alleged errors of the court, in allowing illegal testimony to go to the jury, or refusing to instruct or *improperly* instructing the jury.

In the first place, I shall not admit that the reasons assigned specify exactly, or embrace completely, all the facts that were disclosed on the trial, and I wish to make a particular application of the remark to the second, third, and fourth assignments of reasons.

I submit to the judges before whom the trial was had—to their recollection or notes of the trial—the matters of fact on which these reasons are founded; as, also, whether these were the questions of difficulty reserved, or intended to be reserved. And I submit to the whole court, without comment, whether they furnish sufficient grounds for a new trial.

In proceeding, in the next place, to the principal question—the only one, in truth, that was reserved—I observe that the argument of the opening counsel mistakes the case. This is not now a question of fact where the line was actually run, or where the corner was made, but a question of law, *substantially* amounting to this: Which is the true line between sections Nos. 5 and 6—the line actually *run under the law of 1805, or a

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line to be run from the "box elder," *communiter dictus*, drunken corner?

The decision of this question depends upon the construction of the acts of Congress, and more especially upon three several acts to be found in Clarke's Land Laws, No. 71, p. 420, act of May 18, 1796; No. 107, p. 495, March 26, 1804; No. 111, p. 515, February 11, 1805.

The last act is the most material, its first section having given rise to the present difficulty. This section, reciting the surveying under the act of May 18, 1796 (No. 71), into two-mile blocks, by the running of lines, and the marking of corners at the end of every mile, provides for the running of lines from the mile corners thus marked. Admitting, for the present controversy, that the box elder corner was marked under the act of May 18, 1796 (No. 71), and the line was run from the elm corner, as claimed by the defendant, under the act of February 11, 1805 (No. 111), which governs, the corner marked, or the line run?

Whether the three principles or rules of the act of 1805, for ascertaining the boundaries of the public lands, are to be taken altogether prospectively, or not, is immaterial, and a question I do not choose to make. Indeed, I do, for the purposes of the present question, cheerfully concede, that where, in the first and second rules, it is provided that "*the corners, marked in the surveys, returned*," etc., *and* "*the boundary lines actually run and marked in the surveys, returned*," etc., these provisions or rules only apply to corners and lines antecedently made; for instance, in the present case, the first rule applies to the box elder corner. But the second rule, which, while it establishes the lines actually run, directs others to be run; for instance, the line claimed by defendant surely as much establishes the line thereafter to be run (to wit: the defendant's line), as a boundary, as the line previously surveyed and returned, or as the corner made.

Suppose the *defendant's line* had been one of the lines of the two-mile blocks, and run before the act of 1805, but the corner had been found off the line a hundred poles; the first and second rules would have confirmed both the corner and the line. Indeed, they would have stood in no need of confirmation. The act of May 18, 1796, would of itself, without the aid of these rules, have established the same boundaries, and received the same construction, as the rules themselves. And the rules only confirm the

previously made lines and corners, and are directory to the surveyor as to the manner of completing the surveying, authorized 156] *by section 1 of the same act of February 11, 1805. But suppose the case put, of a line of the two-mile blocks, and a corner off the line, both made previously to the act of 1805, and both confirmed by the first and second rules, would the corner control the line, or the line the corner? A corner is no boundary; it is only a terminus of a boundary. It is a point. It has no length or breadth. A line is a boundary to a superficies. If without breadth, it has length. It is more labor to make a line than a corner. It has more marks. It is more easily found and identified. Should you establish the corner in preference to the line, where are you to go? The corner gives you no boundary. You must run an imaginary line, when you have an *actual* line which the law establishes; you sacrifice a *line* to a *point*, the *major* to the *minor*. If you establish the line in preference to the corner, your work is complete, the business is done, the boundary is entirely ascertained; whereas, should you establish the corner in preference to the line, you have no boundary, you only have a terminus; the other terminus is to be ascertained, and a line to be measured or ascertained between the *termini*.

But is the case altered by the fact, that the box elder corner was made under the law of 1796, and the line run under the act of 1805; or, because the law of 1805 directs the line to be run from the corners made under the law of 1796? It would be trifling with the court to say much in answer to the first query. The validity of a law does not depend upon its priority, or posteriority of date; nor does the validity of an act, done under a law. Indeed, if there is any preference in this respect, it is in favor of the last law, and the act done under it. But I suppose acts in *pari materia* are to be construed together as parts of *one* code, as *one* statute.

As to the second query: What was the object of the act of 1805? Mile corners had been marked, but mile lines not run, and the law directs them to be run. Congress was not satisfied that the public lands should be sold by an imaginary line, to be run from a marked corner. Congress required the line to be surveyed, and directed the manner in which it should be surveyed, its termini, etc. And now, for what purpose? For the purpose of bounding or selling the land by an imaginary line, to be run

from the corners antecedently marked, pray? This could have been done under the former laws. No, I mistake, not after the act of March 26, 1804. No. 107, p. 495. By section 13 (p. 501), every section, and its subdivisions, is to be surveyed, and the *lines marked (the fees to be paid by the purchaser), by a [157 deputy surveyor, before the issuing of a final certificate. Before the last act, Congress sold by corners and imaginary lines. What was the evil, under the former laws, which Congress, by section 13 of the act of 1804, and especially the act of 1805, designed to remedy? It was the selling by corners and imaginary lines. And what was the remedy? The actual marking and running the lines. And shall we make the remedy nugatory, worse than the disease, in case of a conflict between the line and corner? Shall the court invalidate the last act under the law, the act of the officer appointed by the law to ascertain and determine the corners and run the lines from them? Shall the court thrust out and substitute itself in place of the officer, revise his decision as to the corner, reverse the line he has run, and reintroduce the mischiefs the act of Congress remedies—the mischief of a sale by corners and imaginary lines?

The object of the legislature, in passing the present law, is plain. Corner marks might be effaced, the trees cut down; there is always great difficulty in finding them; imaginary lines are not clear, distinct, or safe and convenient boundaries between occupants. To provide a remedy for these inconveniences, the legislature provide that the actual lines shall be run. They are run; but in running them, the officer does not comply with the law; he does not run due north or south; he does not run a straight line between the corners; he does not begin at the corner marked; all which he is required to do, by the act of 1805; therefore, says the plaintiff, his acts are void, and you are thrown back upon the corners and marks, and imaginary lines, of the law of 1796. The same argument would apply to the proceedings under the act of 1796; and instead of being governed by the survey as made, we should be governed by the survey as it ought to be made.

The argument, when pushed to its logical consequence, has this extent; it shows the act of Congress of 1805 nugatory, as it insists we are not to be governed by what was actually done under it, but by what ought to have been done. That is, it insists we are not to be governed by the line actually run, but by an imagi-

nary line to be run from the marked corners, which is *exactly* the boundary, and rule to govern, before the passage of the act. I insist that wherever a section line is run, under the act of 1805, the argument of the gentleman places the parties in the same situation as if it had not been run, and as if the act had never passed. The 158] case must be governed, he says, by the corners and *an imaginary line. Such was the law; but I submit whether the act of 1805 is not annulled *pro tanto* by this construction.

Judge LANE delivered the opinion of the court:

The question arising upon these facts is, whether a corner set in a survey, made under the act of 1796, is so absolutely unalterable, that a subsequent surveyor is bound to adopt it, however erroneous, as an element of later subdivisions, or whether, in case the lines of subdivision are so run as to correct the mistake, and the survey and field notes are deposited in the proper office, a subsequent purchaser may disregard the completed survey, and extend his boundaries beyond the lines run to the first established corner. If the affirmative of these propositions be maintained, the defendant will lose two hundred and fifty-two acres of land, lying on the Scioto bottom, from the three hundred and forty-five acres which he purchased, and the plaintiff will recover two hundred and fourteen acres for which he never paid.

If instruments were perfect, and surveyors entirely skillful, the law which directs corners to be set at prescribed distances, and connected by straight lines of subdivision, might be easily obeyed; but so many causes of error attend geodetical operations, that no minute accuracy, or exact correspondence in the work of different agents, is attainable by any ordinary pains. To prevent disputes, therefore, it has been a governing principle in the disposition of public lands, since 1796, that surveys, to define the limits and ascertain the quantity of lots, shall be made by officers of the United States, and taken to be correct. As deeds are defined by lines, not by points, corners do not make the boundaries of surveys, although they form the termination and give direction to the boundary lines. These lines must be run; no survey is complete without them. The statute of 1805 refers to them as necessary parts of these surveys, and lots can not be identified without reference to the records of these lines, kept in the office of the surveyor general "for public information" (Swan's Land Laws,

36), or as transmitted to the register by him. It is this actual line which binds purchasers, and to determine this settles the boundaries of lots. This doctrine has been often before the court. Two cases are reported, and another in Champaign county is recollected, recognizing the principle. Wright, 599, 634.

If a mistaken line may be corrected, so may an erroneous corner. If the plaintiff may insist on amending the errors of Denny, the defendant, with equal justice, may correct the mistake of the first survey, by placing the corner at the prescribed distance. *But all these questions are precluded, when [159 the proof shows no line was actually run between these sections with an intention of marking boundaries, except that which adopts the elm corner. The rule is, in truth, a rule of peace, and is especially applicable to a purchase subsequent, and in reference to a line run, where the purchaser has obtained all he contracted to buy.

Motion for new trial overruled.

Judgment for defendants.

NOTE.—In the statement of this case, page 148, at the end of the first paragraph, the following facts were omitted:

"Field notes of this survey were duly returned to the surveyor-general, and by him transmitted to the register of the district, and are the only field notes showing a line run between these sections."

LESSEE OF CHARLES C. PAINE ET AL. v. RODERICK W. SKINNER ET AL.

Between 1805 and 1808 the law did not authorize the sale of a decedent's estate, by his personal representative, where the estate was insolvent.

The statute of limitations is available to protect the possession of a party that enters without color of title.

THIS case was reserved in the county of Geauga, and the action was brought for the recovery of certain lands in that county.

On the trial, before the jury, the lessors of the plaintiff proved that they were the heirs at law of Eleazer Paine, late deceased, and that he died in 1804 seized of the lands in controversy, and here rested their case.

The defendants then proved, that in 1806, Abraham Skinner took possession of these lands, and continued in possession until May 20, 1819, when, by deed, duly executed, and containing covenants of warranty, he conveyed to the defendants; since which time they had been in possession.

They then offered in evidence a deed from the administrators of Eleazer Paine, of whom the said A. Skinner was one, to the said Skinner, dated November 26, 1806; and with this deed a copy from the records of the court of common pleas of Trumbull county, in which county these lands were situated at the time of the death of Paine, showing the settlement of his estate. From this copy of record, it appears that administrators were appointed on this estate at the June term of the court, 1804, that the estate was insolvent, that trustees were appointed, and other proceedings had, in 160] conformity with the law of February 11, 1802, "for *the settlement and distribution of insolvent estates," the law in force at the time letters of administration were granted; and that at the November term of the same court, 1805, an order was made for the sale of the real estate.

At the March term, 1807, returns of sales, of both real and personal property were made, a dividend was declared, and the administrators were ordered to pay to the creditors forty-one cents upon each dollar of their debts. From the return of sales it appears that Skinner, who was one of the administrators, purchased at the sale the land, or a part of the land, in controversy.

To the introduction of this deed and copy of record as evidence, the counsel for the plaintiff objected, and the objection was sustained by the court.

Counsel for the defendants then claimed that they had shown twenty-seven years actual, exclusive possession and occupancy to the land in dispute, under *claim* of title, previous to the commencement of this action, and requested the court to instruct the jury that such possession entitled them to the protection of the statute of limitations. This the court refused, but instructed the jury that such possession, unaccompanied by proof, to show color of title, was not such a possession as to protect the defendants.

Under this instruction the jury returned a verdict for the plaintiff.

The defendants then moved for a new trial, assigning the following reasons:

1. The court erred in rejecting the testimony offered by the defendants.

2. The court erred in instructing the jury that an actual, exclusive possession of lands by the defendants, under claim of title, for the period of twenty-seven years, would not entitle them to the protection of the statute of limitations.

3. The verdict is against law, etc.

R. Hitchcock, in favor of the motion, argued that the testimony offered by the defendants should have been received. He insisted that this testimony was sufficient to prove a perfect legal title to the premises in controversy in the defendants. He went into a careful and critical examination of the act of February 11, 1805, "directing the distribution of insolvent estates," (1 Chase's Stat. 495), and inferred, from all its provisions, that it was the intention of the legislature that the whole estate, real and personal, of an insolvent decedent, should be distributed among his creditors.

*He further argued that if the court making the order of [161 sale have power to make that order, the title of the defendants must be considered good, although the statute had not been literally complied with. In support of this position, he cited 3 Ohio, 257, 325, 561; 2 Pet. 163; 2 Bin. 46, 47; 1 Ohio, 200; 2 Bin. 40; 4 Wheat. 508.

He further insisted that, admitting the proceedings of the court of common pleas ordering the sale of E. Paine's real estate to be void, that still the deed offered in evidence was sufficient to prove color of title; and further, that under the statute of Ohio, adverse possession for the time specified in the statute, under claim, even without color of title, will bar an action of ejectment, and cited 7 Ohio, pt. 1, p. 264; 9 Wend. 519; 9 Johns. 180; 10 Johns. 356; 18 Johns. 361; 8 Cow. 589; 9 Cow. 531; 16 Johns. 293; 2 Caine. 183; 1 Term, 351; 3 Murphy, 539.

Webb, Perkins, and Osborn, in opposition to the motion, insisted that the evidence offered was properly rejected, because the order of court for the sale of land by the administrator was void, being made without authority of law. 3 Ohio, 533; 4 Ohio, 131; 5 Ohio, 494.

The deed was properly rejected because it is void upon its face, reciting no order or authority to sell. Ohio Forms and Prac. 390; 2 Swift's Dig. 289, 790; 6 Conn. 373; 3 Stark. 1198; Cowp. 29.

It is also void for want of parties, Skinner being both grantor

and grantee. Co. Lit. 33, b; 2 Black. Com. 440–442; 2 Kent's Com. 363.

The deed was properly ruled out, because it neither does, nor does it profess to convey property belonging to the estate or to the heirs of Eleazer Paine, nor to be in execution of a power, but to grant the estate of administrators. 6 Conn. 373, 258.

They further contended that the possession of the defendants was not such as to bar the plaintiff, for the following reasons:

1. It was a naked possession, without color of title, and such possession is not sufficient to bar the plaintiff in ejectment. Tillinghast Ballentine, 383, and cases there cited; 10 Martin, 293; 9 Wheat. 541; 11 Wheat. 90; 8 Conn. 544, 551, 588; 5 Pick. 20, 27; 12 Johns. 365; 8 Conn. 605; 4 Day, 284.

2. Skinner was a trustee, and the possession of a trustee is not
162] *adverse, and in favor of such possession the statute does not run. 6 Johns. Ch. 122; 1 Wash. 145; 5 Johns. Ch. 531; 3 Litt. 177, 181; 4 Mans. 222; 5 Pick. 321; 4 Har. & J. 430; 3 Atk. 459; 4 Dep. 77.

3. Skinner's deed was fraudulent, and therefore his possession under it is not a bar 10 Johns. 437, 462, 463; 11 Wheat. 90.

Judge HITCHCOCK delivered the opinion of the court:

This case has been argued at great length and with much earnestness by the counsel for the respective parties, and some questions have been discussed which it is unnecessary to examine in order to arrive at a correct conclusion with respect to the present motion. The first reason assigned for a new trial is, that the court erred in rejecting the deed and copy of record offered in evidence by the defendant. In order to ascertain whether the court erred in this particular, it is necessary to inquire, whether, at the time the order of sale was made by the court of common pleas of Trumbull county, there was any law in force in the state, authorizing such order, or authorizing the sale of the lands of an intestate by his administrator. This land was sold in 1806, in pursuance of an order made by the court of common pleas, at the November term, 1805. Eleazer Paine died, and his administrators were appointed in the year 1804. At the time of their appointment there is no controversy but that his lands, as well as his personal property, might be subjected, if necessary, by his administrators, to the payment of his debts. It will be remembered, however, that dur.

ing the session of the legislature, commencing in December, 1804, there was a general revision of the laws, and material changes made, so far as respected the settlement of testate and intestate estates. Questions growing out of the legislation of this session of the legislature, upon this particular subject, have been repeatedly before the court. In the case of Ludlow's Heirs v. Johnson, 5 Ohio, 553, it was held, that by this legislation, lands which, from the year 1795, had been under certain restrictions, assets in the hands of administrators for the payment of debts, were withdrawn from them, so far as respects solvent estates at least. This case was repeatedly argued, and was not decided until after much reflection and deliberation. Why this change was made, or what was the policy which dictated it, we know not, nor is it our business to inquire.

In that case, the estate was solvent; in the present, it was insolvent. The court were careful to go no further than was *necessary for the decision of the case before them, and [163 avoided the expression of an opinion upon one, situated like the present, although a doubt was suggested whether there was, in this respect, any difference between a solvent and insolvent estate. It is argued, by counsel for the defendant, that the law of February 11, 1805, "for the distribution of insolvent estates" (1 Chase's Stat. 495), authorizes the distribution of both of the realty and personalty of an insolvent decedent. Before proceeding to the examination of this act, it is proper to remark that all the laws in force at the time this law was enacted, touching the subject of the sale of lands by administrators, had been adopted, or enacted, by the territorial authorities. There had been no state legislation upon the subject, for the act of February 18, 1804, "defining the duties of administrators on wills and intestate estates" (1 Chase's Stat. 435), confided to administrators the care of personal property alone. These territorial laws were, most of them, repealed by their titles, but lest some might, by possibility, have escaped, on February 22, 1805, there was a general repealing law, putting an end to the operation of all territorial legislation, with the exception of some few private acts, and the laws on the subject of levying a territorial tax. 1 Chase's Stat. 517. At the same session of the legislature, to wit, the session of 1804–5, the law of February 18, 1804, before referred to, was repealed. The law of February 11, 1805, like all the other general laws,

enacted at the same session, took effect on the first of June of that year. On June 1, 1805, then, there was no law of the State of Ohio making real estate assets in the hands of administrators, under any circumstances, unless it be this act of the 11th of February of that year, "for the distribution of insolvent estates."

In giving a construction to this statute, it will not do to have reference to any prior legislation to remove anything doubtful, unless that legislation is expressly, or by implication referred to. It must, as far as possible, be construed by its own terms, or, if we look to other legislation, it must be that which is contemporaneous, and which is most intimately connected with the same subject. This is the more necessary, as on the very day this law took effect, all prior laws with respect to the settlement of estates, testate or intestate, solvent or insolvent, were repealed. The only one enacted by the legislature, at the same session, that can be considered as having, in any shape, reference to the same subject-
164] matter, is the law of February 1, 1805, entitled an *act "defining the duties of administrators on wills and intestate estates, and for the appointment of guardians." 1 Chase's Stat. 496. No one can for a moment doubt, from an examination of this law, that it was the intention of the legislature that administrators should have nothing to do with the realty. The general duties of administrators are prescribed, the manner in which the personal property shall be disposed of, and the time within which the settlement of the estate shall be made. In this act nothing is said as to the solvency of the estate, and no provision is made for distribution, if it should prove insolvent.

The system, then, was incomplete without the law of February 11, 1805, "directing the distribution of insolvent estates" (1 Chase's Stat. 495); and it seems to me that this latter law may be considered as nothing more or less than a supplement to the former. Taking the two together, provision is made for the settlement of both solvent and insolvent estates, but in neither case is express provision made for the disposition of the real estate of the intestate or testator.

It may be proper, however, to be a little more specific in our examination of this law. The first section provides, that when an estate is found to be insufficient to pay all the just debts of the deceased, the executor, or administrator, shall represent the fact to the court of common pleas, and if the court is satisfied that the

estate is insolvent, they are required to appoint two or more trustees. By section 2, it is made the duty of the trustees, and the executor, or administrator, to meet on a day to be appointed; and the trustees are required to adjust all the accounts exhibited, "and make equal distribution to the creditors severally, in proportion to the amount of their accounts as adjusted, after first deducting out of the estate the physician's bill, the debts incurred during the last sickness, and the funeral expenses of the deceased, all the expenses necessarily arising on the settlement of the estate, and also saving to the widow her *right of dower* and bed, with the useful furniture thereunto belonging, and her wearing apparel, etc. Section 3 provides that creditors who shall not have presented their claims, shall be barred, unless under peculiar circumstances; and the fourth directs the trustees in what manner to make their returns.

There are some expressions, it is true, in this statute, which, taken by themselves, would lead to the conclusion that the intention was, that the whole estate, whether real or personal, of an *insolvent should be distributed among his creditors in pro- [165 portion to their respective demands. The widow's "*right of dower*" is secured, and in strict legal parlance this right grew out of, or is attached to lands alone; still the law does not expressly mention *real estate*, nor does it contain any provision as to the manner in which it should be disposed of. The act of 1802, upon the same subject, 1 Chase's Stat. 357, which was repealed by this act, is explicit upon this point, and, if it was the intention to continue the same principle, it is strange that it should not have been expressly provided for, especially when we consider that there was no other law in force from which it could be deduced. Upon mature deliberation, we are inclined to consider this act as supplementary to the act "defining the duties of administrators," etc., and are of opinion, that neither the one nor the other authorized personal representatives, under any circumstances, to dispose of the real estate of a testator or intestate.

Of course, the sale of the lands of Eleazer Paine, by his administrators, was without authority, and the deed offered in evidence was properly rejected as proof of title in the defendants. The copy of record, too, was properly rejected for the same reason. The court had no authority to make the order of sale, and that order was consequently void.

It is insisted, however, that this deed, although void as conveying title, should have been allowed to go in evidence to show color of title. In the view which we take of the case, it is unnecessary to decide this point. It may not, however, be improper to remark, that there are circumstances which will induce a court to permit a deed to go in evidence to a jury for a particular purpose, as to show the extent of a claim of possession, although the same deed must be rejected as evidence of title. 7 Ohio, pt. 1, p. 53.

The second reason assigned for a new trial is, that the court erred in instructing the jury, that an actual exclusive possession of land by the defendants, under claim of title, for twenty-seven years, would not entitle them to the protection of the statute of limitations.

It is proper to remark that, in giving this instruction, the court did not intend to express a deliberate opinion upon the point raised, but as it was deemed proper, on account of the point already discussed, that the case should be reserved, this instruction was given, that the important questions arising in the case might be settled in bank.

166] *Numerous authorities have been cited to sustain the position, that adverse possession, without color of title, will not be protected by a statute of limitations. It is unnecessary to examine these authorities, as we have no doubt that such is the law in the State of New York, and in some of the other states of the Union. In some, however, if not in all the states, where this principle prevails, it is owing to the particular phraseology of their limitation laws. In other states, as in Pennsylvania, South Carolina, and Kentucky, the decisions have been otherwise. Reference has been made to some of the decisions of the Supreme Court of the United States. Upon this particular point, those decisions are of no more binding force than the decisions of the courts of the states, for in deciding upon state laws, that court follows the construction given by the state courts. Before the decision of a court of another state, giving construction to a statute of that state, can be obligatory here, it must be shown that the statute construed, is substantially, if not literally, like our own. Even if it be so, the decision is not obligatory, although entitled to the highest respect.

The act "for the limitation of actions," passed January 4, 1804 (1 Chase's Stat. 392), provides, in section 2, "that no person

or persons shall hereafter sue, have, or maintain any action of ejectment, or other action for the recovery of any possession, title, claim of, to, or for any lands, tenements, or other hereditaments, but within twenty years next after the right of such actions, or suits, shall have accrued." This was the law in force at the time the right of action accrued in the case now before the court, and by which it must be decided. It would seem that this language was explicit, and could not be misunderstood. Nothing is said about color of title, and I know not by what authority this court is authorized to make the interpolation. In the present case, at least, it is not necessary for the furtherance of justice. When does a right of action accrue in ejectment? Unquestionably when the person having the right of possession is divested of that possession. When did the right of action accrue in the present case? In 1806, when Skinner took possession, and before this action was brought, more than twenty-seven years had elapsed. How can we say that the statute can not operate, because there is no color of title? It would be defeating the obvious meaning and intent of the law. The uniform construction hitherto given to this statute has been that the possession under which a person claims to be protected, must be continued, exclusive and adverse; *and this we believe to be the true construction. Whether [167 there is, or is not, color of title, is wholly immaterial. We are of opinion, therefore, that the court erred in the instruction complained of.

It is urged, however, that if the court erred in this particular, still that a new trial should not be awarded, because Skinner was acting as trustee for the plaintiff, and the possession of a trustee will not operate as a bar under the statute of limitations. If we are correct in the opinion that the administrators had no power over the lands, then, as to these, Skinner was not a trustee, and the argument fails.

Again, it is urged that the deed of Skinner was fraudulent; and having obtained possession under a fraudulent deed, he, or those claiming under him, can not be protected under the statute. Where is the evidence of fraud? The administrators of Eleazer Paine supposed that they had a right to sell his lands for the payment of his debts. They had the right when they were appointed; and the court, by whom they were appointed, supposed they had the right, and made an order accordingly. In pursuance of this

order the lands were sold and Skinner became one of the purchasers. For this land he paid his money, and that money went in part payment of the intestate's debts. The widow of that intestate, and the mother of the lessors of the plaintiff, was one of those administrators; and now these lessors, after a lapse of nearly thirty years, are seeking to recover these lands discharged of the debts of their ancestor, and without any offer to refund what Skinner has paid toward those debts. If there be any fraud in the case, it is not on the part of the defendants or those under whom they claim.

A new trial will be granted, the costs to abide the event of the suit.

DANIEL FELTER *v.* JACOB WEYBRIGHT ET AL.

A contract to convey land sold, on the 1st of August, or as soon as the vendee shall pay two thousand dollars, is fixed for ultimate execution on August 1, 1835. A subsequent tender of a conveyance does not entitle the vendor to an action for the purchase money.

THIS cause was adjourned from the county of Montgomery. It was an action of debt, by the vendor of a tract of land, against the purchasers, to recover an installment of the purchase money. The pleadings and case reserved involved sundry points, but the court, by the decision of one, rendered it unnecessary to consider any other.

168] *The contract bore date September 8, 1834, and stipulated that the vendor should convey to the vendees, on or before August 1, 1835, or as soon as the vendees shall pay to the vendor two thousand dollars; and then the vendees shall give their notes for four thousand dollars, payable in six annual installments.

The declaration averred, that on April 28, 1836, the vendor, the plaintiff, tendered to the vendees a deed, and demanded the two thousand dollars, and the obligations for the four thousand dollars, which the vendors refused, etc.; whereby an action accrued to demand and have the two thousand dollars. The defendants craved oyer, and demurred.

STODDARD, for plaintiff.
HOLT, for defendants.

GRIMKE, J., delivered the opinion of the court:

When an instrument of writing is drawn with any degree of obscurity, it is impossible to give an interpretation to it which shall be absolutely satisfactory. In the attempt to ascertain the true meaning, it is unavoidable that we should, to some extent, substitute our individual judgments in the place of that of the parties. This instrument, though speaking of the plainest things, of matters which may be reduced to the greatest precision and certainty, is yet so ambiguous, that, without giving very close attention to it, different minds might be led to give an entire different construction to it. The conclusion to which we have come is, that August 1, 1835, is the ultimate time fixed for the execution of the contract; that the terms, "or as soon as the vendees shall pay to the vendor two thousand dollars," relate only to time between the making of the contract and August 1, 1835, within which the vendee, by the payment of the two thousand dollars, might hasten his right to demand a conveyance. This interpretation of the contract precludes the plaintiff from maintaining his action on the tender of a deed in April, 1836; and judgment on the demurrer must be given for the defendant.

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*DANIEL H. WHEELER v. JAMES W. KNAGGS. [169

Where an agent, in executing his power to sell, recites his agency, and describes himself in the body of a contract as executing a power, it is not necessary that he should add his character of agent or attorney to his superscription of the contract.

A power of attorney may contain covenants, subjecting the principal to a party contracting with the attorney, and to the action of the attorney also.

Where an attorney, in executing a power to sell, makes a separate agreement with the purchaser in respect to a contingent interest of the attorney in the contract, such fact does not make the purchaser and attorney joint contractors, in relation to the principal.

A power of attorney, coupled with an interest, can not be revoked after an agreement is made for its execution.

An offer to pay in bank notes, and a declaration of the party to receive payment, that he would as soon take bank notes as specie, but that he would take neither, and would not ratify the contract, is a sufficient tender of payment.

It is no answer to an action by the attorney against his principal, upon a collateral agreement, that a private understanding between the parties had been broken by the attorney.

In a contract that an agent to sell land shall retain for his own use all the purchase money above a sum stated, the rule of damages between agent and principal is the amount beyond the stipulated sum for which a contract is made, that the principal refuses to ratify.

In such case the right of action accrues upon the refusal to ratify, though an extended credit be given for the contracted excess.

RESERVED in the county of Lucas.

Judge WOOD stated the case, and delivered the opinion of the court:

This action is brought on a covenant contained in a power of attorney, executed on February 4, 1836, which authorizes the plaintiff to sell certain tracts of land in Lucas county, for any sum not less than ten thousand dollars, and to transfer the same by bond or contract, under seal. The defendant obligates himself to make any necessary conveyance, by reason of such sale, and "to release and relinquish to the plaintiff, to his own proper use and benefit, all sums over and above said ten thousand dollars, for which the plaintiff should be enabled to sell the land."

Under this authority, the plaintiff, on February 22, 1836, made a proposition to one Hiram Wellman to sell him the land, comprising one hundred and forty-two and one hundred and fifty-seven one hundred and sixtieth acres, at the rate of one hundred dollars per acre. This proposition was in writing, and signed by Wheeler; but in the body of the instrument he was described as the agent of the defendant. Ten thousand dollars was to be paid on or before April 20, 1836, and the balance in one year, with interest; *provided*, Wellman notified the plaintiff in twenty-nine days that he accepted the offer, and paid the ten thousand dollars, as specified in said proposition, and secured the balance of four thousand three hundred dollars by a mortgage on the land.

Wellman, within the time limited, accepted the terms proposed,

informed the plaintiff thereof by letter, and the day before the ten thousand dollars became due, tendered the amount to the defendant in current bank notes, and demanded a conveyance. The defendant refused to ratify the contract, and this action was commenced to recover the amount over ten thousand dollars, for which the plaintiff had bargained the land.

The defendent pleaded *non est factum*, and gave notice, in bar of the action, that before the sale of the land, by an understanding between the plaintiff and defendant, the power of attorney was void; that it was obtained by fraud and covin; that in the sale of the land, the plaintiff was making a fraudulent use of said power of attorney, to cheat and defraud the defendant, the land having greatly increased in value, of which the plaintiff was well aware.

*On these pleadings the cause was tried, on the last cir- [170 cuit, and a verdict found for the plaintiff for three thousand and eighty-seven dollars. The defendant moved for a new trial, and this motion presents the questions reserved for decision in this court.

The counsel for the defendant contends that the court erred in permitting the written proposition made by the plaintiff to Wellman, to go in evidence to the jury. The nature and legal effect of this instrument have been very zealously and ingeniously discussed. It was the *substratum* on which the plaintiff must have built his hopes of a recovery; and, if irrelevant to the issue, the verdict can not be sustained. It was said to be irrelevant, because the defendant was not bound by it, as it was signed by the plaintiff in his *own* name, and not as an *agent*. By an examination of the proposition it will be found, that in the body of it, the plaintiff describes himself as the agent of the defendant, and as making the proposition for him, and on his behalf; and, in our view, it was unnecessary for him again to add to his signature the character in which he acted. If his character can be gathered from the whole instrument, it is sufficient. This bears no analogy to the cases cited, where the pretended agent affixes the seal to his *own* name, and not to the name of his principal. In such case, it is the *seal* that *executes* the contract, and the inquiry is, not who has *signed*, but who has *sealed* the paper. If the agent affixes the seal to his own name, although he may add the words, *as agent*, those words will be merely a *descriptio personæ*, and

not of the character in which he does the act. The sealing of the contract is decisive of his character, and not to be disputed. The paper in question, executed by the defendant through his agent, was the act of the defendant, and not liable to objection on the ground assumed. But, it is said, the power of attorney, only authorized the plaintiff to bind the defendant by *bond, or contract, under seal*, and not by *parol*. The words used in the power of attorney, are these: "To sell, transfer, and by bond, or without, under seal, if required, or *otherwise* convey," and are sufficiently extensive to embrace any mode of contracting, known to the law, in relation to real estate. It is said, again, that the covenant to convey is to the purchaser, and that the plaintiff, who was but the agent, could take no advantage of a refusal to convey to Wellman, because he was not a party to such covenant, and that the evidence of a sale by the defendant to Wellman was, for that reason, improper. It appears to us, the deduction drawn by counsel from the premises is by no means 171] *legal. It is true the covenant to convey may be said to run with the sale, to whomsoever made, but the power of attorney contains another covenant to the plaintiff, *to release and relinquish to him* any sum beyond ten thousand dollars, for which he shall be enabled to dispose of the lands. This covenant exists between the parties to this action only; that it was so intended no one can doubt. It is the sum fixed by the parties as to the amount of compensation the agent, in a certain event, shall receive. This power of attorney may properly be said to consist: 1. In a covenant to the purchaser to convey; and, 2. In a covenant to the plaintiff, the agent who made the sale, *to release and relinquish to him* the stipulated compensation; and either the purchaser or agent, in case of a breach of the covenant to him, may, we think, maintain an action. The suit was brought by the plaintiff on the covenant to him; it was necessary for him to show performance of all conditions precedent; he must prove a sale to Wellman and the amount of that sale. Was not the proposition to sell, accompanied with the terms, a necessary and indispensable link in the chain of evidence to establish that fact? If so, it was clearly relevant to the issue, and proper for the consideration of the jury. Without proof of this proposition the plaintiff could not have shown its acceptance and the final consummation of the sale, and, consequently, no right to recover would have existed.

It is urged the court erred in permitting the power of attorney to go in evidence to the jury. It is said the liability of the defendant is a joint liability to the plaintiff and *Wellman*. If so, it should have been rejected, for it was not the covenant described in the plaintiff's declaration. But this objection can not arise from anything apparent upon the face of the instrument, for the name of Wellman does not occur in it. Wellman was, however, admittted as a witness on the trial, and testified that, to induce him to purchase the land, the plaintiff had agreed to deduct one-third of the amount over ten thousand dollars, submitted in his written proposition, as the consideration; and that, on such condition, the contract was made. The evidence, it is said, makes Wellman a joint obligee with the plaintiff in the covenant on which this action is founded. Such, we apprehend, is not the legal consequence. This was a collateral agreement, independent of the defendant's covenant, to which he was not a party, nor were his rights in any way affected by it. No such agreement, without his consent, could make the defendant liable to pay to **two* [172 that which he was liable only to pay to *one*. Whatever contract others may make, the defendant was to receive ten thousand dollars or he was not bound to convey the land, and he was to release and relinquish all over that sum, more or less. The liability of the defendant could only be changed by the concurrence of his own mind; and he not having agreed to include *another*, as a joint covenantee, his covenant to the plaintiff remained unchanged, and the power of attorney in which it was contained was properly admitted.

It was urged, that no legal tender was made to the defendant of the ten thousand dollars until after the power of attorney was revoked. The evidence on the trial was that the revocation was drawn, signed, sealed by the defendant, and notified to the plaintiff, on the 14th March, nearly a month after the proposition was made, and after the same was in fact accepted! There is no doubt of the power of the principal, by a proper instrument, to revoke a naked authority—one not coupled with an interest—while the same remains unexecuted and the rights of the parties *in statu quo*. But in this case the sale was made before any pretended revocation. On the 2d March, Wellman wrote to the plaintiff, from New York, to consider the proposition as accepted if he did not hear from him again within the time limited, and

afterward expressly accepted the proposition. To say the principal, under such circumstances, may revoke, would be destructive to the rights of the parties. It would confer upon him authority to rescind his contracts, without any violation or fault of the other contracting party and against his dissent. Such a principle can be sustained, certainly, by no legal rule.

It is claimed, that no legal tender was made by Wellman to the defendant. If we did not mistake him, Wellman testified on the trial, that on the 14th April he went to the defendant with ten thousand dollars in current bank notes, informed him he had the money and demanded the fulfillment of the agreement; that he told the defendant there was sufficient time, and he would obtain the specie for him if he required it. To this the defendant replied he would accept bank notes as soon as specie; he would take neither, nor would he ratify the sale. Can it be doubted that this is a sufficient tender of the money? An offer to pay in bank notes is equivalent to an offer to pay specie unless objected to. It can not be successfully claimed that Wellman was bound to count out the money; it is sufficient that 173] *the money was there, and that enough was offered to the defendant; the law requires of the payee to tell the money.

It is supposed the court erred in refusing to permit evidence to go to the jury that there was an understanding between the parties that the plaintiff was to sell the land, so that the defendant could have the money by the 4th March, to use at the sales at Bucyrus. Such evidence was offered and rejected; but how could it have affected the issue had it been received? If the sale was not made by the 4th March, it is not claimed by the motion it was not to be made at all. It could, therefore, be no bar to the action; and if the plaintiff sustained an injury by the delay, or neglect of his agent, it furnished him with no liquidated demand, which was the subject of set-off, nor could it go in mitigation of damages. The plaintiff would be compelled to resort to his action for redress; the evidence offered could not, therefore, be legally sent to the jury.

It is believed by counsel that the court erred in charging the jury that the rule of damages was the amount for which the land was sold over and above the ten thousand dollars. We incline to the opinion such instruction was correct; the law intends the remedy shall be adequate to the injury; that the plaintiff shall be

placed in as good a situation by the verdict as he would have been in had the defendant not broken his covenant. If the defendant had kept his covenant, the amount, over ten thousand dollars, for which the land was sold, would have been received by the plaintiff, deducting the amount afterward thrown off, to induce Wellman to complete the purchase. This, then, was clearly what the plaintiff lost; and the jury were instructed, after making such deduction, that the balance was the proper sum, if they found for the plaintiff, to which he would be entitled as damages. The jury obeyed this instruction. Nothing more than substantial justice has been done, and of that the defendant ought not to complain.

It is said, as the last hope of the defendant, that the action was prematurely brought; that Wellman was not to pay the excess over ten thousand dollars until a year from April 14, 1836, and that this suit was commenced before that time had expired. It is very true the plaintiff could not have maintained an action against Wellman until the credit had expired; but the defendant agreed to convey whenever the plaintiff should make the sale. By breaking this covenant, the plaintiff was instantly damnified by losing the benefit of his agreement, and *not being able to receive [174 Wellman's obligations, secured by mortgage, on the land. This security, so far as the defendant is concerned, the law would hold equivalent to money, and as well might it be contended that an action of trover or trespass could not be maintained for a note, *not due*, wrongfully withheld, or forcibly taken, as that this action is not maintainable on the ground assumed. The third, sixth, eighth, and eleventh points made by the motion have been disposed of in passing upon the others, and need not be separately noticed. The amount in dispute, in this case, is large, and we have felt a disposition to indulge the defendant as long as anything could be said in his defense. His counsel has argued his case with zeal and ability, creditable to his industry and talent. The case may be, in some of its features, novel, but we see no serious difficulty in supporting the verdict of the jury. We have given the case a very careful examination, and the result leads to the conviction that the motion must be overruled, and judgment entered on the verdict.

J. M. May, for the motion.

A. Coffinbery, contra.

Abraham Wilson v. Trustees of No. 16.

Suits by quasi corporations, such as township trustees, are to be brought in the name of the corporation. It is too late to allege a variance between the party plaintiff in the transcript and in the declaration, after a general plea to the action.

Township trustees can sustain an action for use and occupation against occupants who have held and used the township sections under a void lease

In an action for use and occupation against tenants under a void lease, the writing may be given in evidence to show the value of the rents.

This was a writ of error, adjourned from the county of Montgomery.

The suit was commenced before a justice of the peace, in the name of "Jacob Lodge and James Dunkely, trustees of section 16, township 3, range 6." It was brought into the court of common pleas by appeal, where the declaration, that was filed, commenced thus: "The trustees of school section 16, township 3, range 6, Butler township, Montgomery county, complain," etc., and proceeded to declare in *assumpsit* for use and occupation. The defendant demurred, but withdrew the demurrer, and substituted the plea of *non assumpsit*, and upon this issue the jury found a verdict for the plaintiffs, and judgment was rendered for them; to reverse which the writ of error was brought.

The errors assigned were: 1. That there was a variance in the parties plaintiffs to the original suit, before the justice, and the parties plaintiffs in the declaration, in the court of common pleas. 175] *2. That *assumpsit*, for use and occupation of improved school lands, can not be maintained to recover rents.

P. P. Lowe, for plaintiff in error:

This suit was appealed to common pleas by Wilson. The declaration shows that it has added to the plaintiffs' the words "school, Butler township, Montgomery county, Ohio." This is such a change in the party plaintiffs as the law will not tolerate. Upon this ground a motion was made to nonsuit the plaintiffs in court, and the motion was overruled. A party may change one form of action *ex contractu* to another, but he can not change the name of the plaintiffs in the present controversy after judgment before the magistrate. See 5 Ohio, 186; 29 Ohio L. 492.

It is contended, by the plaintiff in error, that *assumpsit* for use

and occupation of *improved school lands* will not lie to recover rents; that the statute settles the question against the right; it also gives the terms of the lease. "The trustees of townships are a corporation for special, limited purposes, with special and defined powers only, and can not, in general, do any act foreign to the purposes of their creation." 3 Ohio, 157; 5 Ohio, 186; 8 Johns. 425; 9 Johns. 73; 12 Johns. 199.

"The power to lease the school sections is not within the general powers of the trustees of townships; that is a special authority which they are empowered to exercise in only one event." 5 Ohio, 186. It is as important to adhere to the requirements of the statute in leasing improved school lands, as it is in the alienation of lands in fee. The action of *assumpsit* for use and occupation, with all its equitable qualities in relation to landlords and tenants, and the doctrines applicable to it does not apply to this case. Our statute directs the mode a lessee shall hold possession of improved school lands? Any other, or different mode, would be an illegal possession at law, contrary to the statute; and if so, no recovery can be had in the present form of action. It is true that the action for use and occupation was a common law remedy in England both before and since 2 George 2, c. 19, but this statute was enacted for the benefit of English landlords, who were constantly nonsuited by their tenants. 4 Hen. & Mum. 161. Although there was a statute on the subject, yet *assumpsit* for use and occupation lay. Now, will this doctrine apply to the case in question, and to the spirit and *provisions of our statute, leasing improved [176 school lands. Indeed, the whole doctrine claimed by the defendants in error may be looked upon as entirely inapplicable. The statute is a special law, for special lands, but actions of *assumpsit* for use and occupation will not lie where there is an express unexpired lease for the premises. It lies when a tenant holds over, or where there is no agreement. In the present case the law makes the terms of the lease for improved school lands; it makes out the whole contract except the price; it fixes the time of payment, and the manner of protecting the land, etc. Now that these provisions of the statute may be disregarded, the statute not seen or referred to, in order to collect the rents for improved school lands, is a position that certainly can not be subscribed to. Yet if the law regulating landlords and tenants shall govern, then is the statute a useless enactment; but it is said that possession, when

the lease was void, will authorize the bringing of this action. Well, if it will, then there is no difference between the present case and the usual actions for use and occupation.

If, however, this form of action can be maintained in despite of the statutory provision, the court below should have ruled the declaration also bad on the demurrer. No one will deny but that in order to make a contract, leasing improved school lands, good, it should conform to the requisition of the statute strictly. If no contract exists, the right of the plaintiffs to recover is one under the statute, and the declaration should contain: 1. An averment that the lands described in it are school lands. 2. That the defendant, Wilson, occupied the same. 3. That the payment should be averred to be made on the first Monday of December of a given year. 4. That payment was not made to the treasurer, and that therefore plaintiffs were entitled to recover; in short, the declaration should conform to the statute.

If the declaration fails to describe the lands as school lands, it is bad; no one can well conceive how a different opinion can be entertained. This corporation has control over nothing but school lands, and in an action to recover rent, they should show they seek to recover for the occupation of that, the proceeds of which, by statute, they are authorized to receive. The other averments are equally necessary. If the averment, as to the time of payment, be necessary, then no right of action accrued at the time suit was brought.

The court of common pleas erred in suffering an unexpired lease to go to the jury to sustain the plaintiff's declaration for use 177] *and occupation when the suit was brought on the lease. See Bill of Exceptions, 2 Saund. Pl. & Ev. 147.

The common pleas erred in admitting the void lease, because the declaration must be founded on the bill of particulars before the magistrate, and the one must support the other. 6 Ohio, 307; 29 Ohio Stat. 174, sec. 24; see Bill of Exceptions.

The court erred, in charging the jury, that the plaintiffs, in the action for use and occupation, could recover rents up to any period of time, different from that fixed by the statute. See Exceptions, 29 Ohio Stat. 492, sec. 7.

J. H. Crane, for defendants in error:

The first error assigned can not be sustained, for there is no difference between the declaration and the transcript. The parties

are the same in both, and the omission of the names of the trustees in the declaration is no variance. "The safer way of pleading is to omit the names of persons exercising the duties of trustees and use the corporate name only." Trustees of Concord Tp. v. Miller, 5 Ohio, 186; Hally v. Tipping, 3 Wils. 61; Lloyd v. Williams, Ib. 141; Weavers Co. v. Forrest, 2 Str. 1232. Nor were the plaintiffs below confined to the form of action before the justice, but might change from one species of contract to another. Austin v. Hayden, 6 Ohio, 388.

The second, third, fourth, and fifth errors assigned are substantially the same, and are founded on the assumption that no action can be sustained except on such lease as is prescribed by the statute. 29 Ohio Stat. 492, sec. 7. It is contended, that the statute, which gives the trustees the care of the school sections, with power to lease them and to collect the rents, has imposed certain restrictions on the power to lease, and that all agreements, or leases, contrary to that prescribed mode, are without authority, and void. Yet, if under such agreement, or lease, the tenant has occupied the land, the trustees are not without remedy, and the rent may be recovered in an action for use and occupation. In Wood v. Tate, 5 Bos. & Pul. 247, the lease, made by a corporation, was void, in consequence of a blunder in the mode of its execution, yet the lessee was held to be a tenant from year to year, and the plaintiffs had a right to distrain for the rent due. From the transcript of the justice, and the bill of exceptions taken on the trial by the *plaintiff in error, it seems there was an article of agree- [178
ment between the parties, but the article of agreement itself forms no part of the record, and the court can not judge of its nature and contents. If it were an agreement for a lease thereafter to be executed, and the plaintiff in error went into possession under it, the defendants in error might declare for use and occupation, Elliot v. Rogers, 4 Esp. 59, Bannister v. Usborne, cited in Peakes Evid. 242. In McWilliams v. Willis, 1 Wash. 199, it was held, that *indebitatus assumpsit* would lie for use and occupation of a race ground, notwithstanding a subsisting special agreement in writing relating to the subject. It is admitted, that if a valid lease existed, the plaintiffs below were bound to declare on it, but the court can not, in the absence of proof, presume the existence of such a lease. If the article of agreement purported to be a lease, but was not made in conformity to the statute, and was, consequently, inopera-

tive and void as a lease, still the possession of the plaintiff in error under it, would constitute him a tenant from year to year, 5 Bos. & Pul. 247; and the article of agreement might be given in evidence in an action for use and occupation to ascertain the amount of rent. In an action for use and occupation, the plaintiff has been allowed to resort to the original agreement, though void under the statute of frauds, to ascertain the amount of rent due. De Medina *v.* Poulson, per Gibbs, C. J. Holt, 47. In an action for use and occupation, the plaintiff may avail himself of an agreement, not under seal, whereby a rent certain is fixed to regulate the amount of recovery; and although the plaintiff has not declared on the agreement, and claims generally to recover for use and occupation, the defendant is not at liberty to give evidence of the value of the premises occupied, to reduce the recovery below the sum stipulated. Williams *v.* Sherman, 7 Wend. 109. The action for use and occupation is an equitable one, founded on a contract express or implied. Birch *v.* Wright, 1 Term, 387. It could be maintained, at common law, independently of the statute 2. Geo. 2, c. 19, on an express promise to pay the plaintiff a certain sum, Eppes Executors *v.* Cole, 4 Hen. & Mumf. 161 and authorities there cited and also on an implied promise. Sutton *v.* Mandeville, 1 Mumf. 407. There is nothing in the peculiar character and duties of trustees of school sections, which incapacitates them from maintaining this action. It is an appropriate remedy, where the tenant holds over after the expiration of a regular lease, and if sus-
179] tainable in that case, it is equally so *where the tenant has occupied with their assent, under a defective lease, or in any other manner. Debt, for use and occupation, lies by a corporation. Dean and Chapter of Rochester *v.* Peirce, 1 Camp. 466. In the case of a corporation, the law will imply not only a promise, but an existing tenancy in those who hold the land of a corporation, and a corporation aggregate may, therefore, sue for use and occupation, where the tenant has held possession under them, and paid rent. Mayor, etc., of Stafford *v.* Till, 4 Bing. 75. Proof of payment of rent is *prima facie* sufficient to enable the plaintiff to recover in this action, 2 Saund. on Plead. and Evid. 488, and in this case, that fact may be inferred from the transcript, where the action is stated to be brought for the second year's rent. The statute of frauds can not be objected to this action, for possession under the contract takes the case out of the statute. Webber *v.*

Paine, 1 Ohio, 255; Moore v. Beasly, 3 Ib. 296. It is, moreover, an established rule, and one peculiarly applicable to this case, that a tenant is estopped from objecting to the title of his landlord, so long as he continues to enjoy the land. Sullivan v. Stradling, 2 Wils. 218; Hayne v. Maltby, 3 Term 442; Cook v. Loxley, 5 Ib. 4; Hodson v. Sharpe, 10 East, 350; Moore v. Beasly, 3 Ohio, 295; Hart's Lessee v. Johnson, 6 Ib. 89.

Judge LANE delivered the opinion of the court:

The first objection assumes a change of parties; that in the suit appealed, Lodge and Dunkely were plaintiffs, while the declaration in the common pleas is at the suit of section 16. But cases in our own reports (3 Ohio, 224; 5 Ib. 186) show that the proper mode of declaring, where these *quasi corporations* are parties, is by the corporate name, without naming the individuals who compose them. The declaration is right. But, in the case of a variation from the preliminary proceedings, it is too late to except after a plea to the action.

The main question in this case is, whether these trustees can sustain an action for use and occupation. It is urged that they are a corporation with limited powers, capable of leasing for three years only, on a rent payable annually, on the 1st of December, to the treasurer, and not able to hold land for any other purpose. Hence, it is inferred that no action is sustainable by them to recover rent, except upon the lease. This reasoning is correct where a valid lease exists; but where occupation has been enjoyed, *under an invalid lease, no obstacle is perceived to the re- [180 covery of the amount, which the tenant ought *ex equo et bono* to pay, in this form of action. In cases of mere individuals, it is held the proper form of action, where land has been occupied under a void or expired lease. After the defendant has enjoyed the use of land, he is not allowed to raise a mere cavil, to protect himself from paying a fair rent.

A further ground of error is alleged in argument—that is, the court permitted the plaintiff to give the lease in evidence to the jury, to show the yearly value of the occupation, and thus enable them to ascertain the sum they should award to the plaintiff. The conception that the lease was void is the foundation of this exception. But it is settled that a writing between the parties, stipulating the amount of rent to be paid, though void as a

lease, may be used to prove the value of the occupation, as agreed and fixed upon by the defendant himself. 5 B. & P. 247; Holt, 47; 7 Wend. 109. Judgment affirmed.

LESSEE OF CLEMENT A. BUCKLEY ET AL. *v.* WILKENS OSBURN.

Under the law of January 29, 1827, "for the remission of penalties and for the sale of lands for taxes," a sale of land for taxes in arrear before the year 1820, is not defective, although a portion of the taxes that accrued between 1820 and the time of sale are not included; no subsequent sale for the omitted taxes can be legally made.

Where an objection is first taken in bank, that the plaintiff in ejectment can not recover, because he has laid his demise of three lessors, and his proofs show the entire title in one, the cause shall be remanded to the circuit, with leave to amend upon payment of costs.

EJECTMENT for 295 acres of land, it being entry No. 7,540, in the name of John Clemson, on the north fork of Paint creek, in Fayette county.

This case was submitted to the court in Fayette county, upon evidence proving the following facts: On September 20, 1819, the land in controversy was patented to Daniel Buckley, the father of the lessors of the plaintiffs, and devisee of John Clemson.

By his will, Daniel Buckley devised all his real estate, of every description, to his sons, Clement A. Buckley, Matthew B. Buckley, and George W. Buckley, the lessors of the plaintiff. This will had been proved and admitted to record in Pennsylvania, on July 31, 1827, and an authenticated copy admitted to record in the court of common pleas of Fayette county, Ohio, in March, 1837.

The land was entered for taxation in the name of John Clemson, in 1813, and the taxes remained unpaid until the year 1823, 181] *when, at the October term of the court of common pleas of that year, a judgment was recovered in favor of the State of Ohio for the tax, penalty, and interest then due, amounting to $111.60, together with the sum of $5.60 costs. In pursuance of this judgment, the land was offered for sale on July 12, 1824, but was not sold for want of bidders.

In December, 1827, the taxes on the same land being unpaid for the years 1826 and 1827, it was offered for sale, but was not sold for want of bidders.

In pursuance of the law of January 29, 1827, the land was again offered for sale, on December 8, 1828, for the taxes from 1813 to 1825, inclusive, and was sold to James Wood for twenty-five cents. Wood transferred his certificate of purchase to Andrew Ramsey, and on June 29, 1829, the county auditor conveyed the land to Ramsey, in pursuance of the statute in such case made and provided.

In December, 1829, the land was again sold for the taxes of the years 1828 and 1829, and purchased by the same Daniel Ramsey; and on January 4, 1832, Ramsey conveyed all his interest in the premises to Clement A. Buckley, one of the lessors of the plaintiff.

On July 8, 1833, the land was again offered for sale, as being forfeited for the non-payment of the taxes for the years 1826 and 1827, and sold to Norman F. Jones, who had been for many years auditor of Fayette county, and was auditor at the times of the previous sales. Jones assigned his certificate of purchase to John L. Tayler; Tayler to John Thompson, to whom the county auditor made a conveyance, and afterward Thompson conveyed to the defendant.

GREEN & CALDWELL, for the plaintiff, insisted that the sale to Jones, made in 1833, was illegal; that this land was improperly on the duplicate in 1826, and improperly returned delinquent. Of course there was no forfeiture. They further argued that the sale made to Wood, in 1828, should have been for all the taxes up to that period, and if it was not so, the fault was with the officers of the law, in consequence of which, Wood or his assignees could not be made to suffer. In support of these positions, they went into a full examination of the several laws upon the subject, and particularly of the act of January 29, 1827.

*LEONARD, for the defendant, controverted these positions, [182 and insisted that the land in controversy was not within the act of 1827, and should not have been sold under it. He urged that, by that act, it was contemplated that no other forfeited lands should be sold than those which had been forfeited for the non-payment of taxes previous to 1820.

He principally relied upon the fact, however, that there was but one demise in the declaration, which was from Clement A. Buckley, and two others, while the proof showed that the title was in Clem-

ent A. Buckley alone, and the action should have been brought on a demise from him. Til. on Eject. 186.

Judge HITCHCOCK delivered the opinion of the court:

There has been such multifarious legislation upon the subject of taxation, and of the sale of lands for taxes in this state, as to create some confusion; and where a particular case is presented, there is no little difficulty in ascertaining whether the sale has been in conformity with the law, especially if it be in any way connected with the early legislation upon the subject.

The lessors of the plaintiff derive title to the premises in controversy, in virtue of the last will and testament of David Buckley, the patentee, and this title is perfect unless it has been divested by some of the tax sales. The first of these sales, in point of time, was on December 8, 1828, and was intended to be made in pursuance of the law of January 29, 1827.

It appears that this land was originally entered for taxation in the year 1813, in the name of John Clemson, and continued so to be entered until 1823, the taxes for the whole period being unpaid. Any person acquainted with the history of the state knows of the difficulty that existed in the collection of taxes in early times, and of the difficulty of sustaining sales which were made of lands for the non-payment of taxes. In consequence of these difficulties, sales were ordered by the legislature from year to year to be suspended, and it is believed that none took place from 1814 until after 1822. Penalties, however, were constantly accruing previous to 1820, at the rate of 100 per cent. upon the amount of tax for each year; and where lands had been twice returned delinquent, they were no longer continued upon the duplicate, but were subject to sale, and were only restored by the payment of all arrearages of taxes and penalty. On February 8, 1820, a law "levying a tax on
183] land" *was enacted (2 Chase's Stat. 1101), materially changing the system, so far as the collection of taxes was concerned. Previous to this time, a difference had been made between resident and non-resident proprietors of land. The taxes of the former were collected in the several counties where they resided; but for the convenience of the latter, the state had been divided into six districts, called collection districts, and for each district a collector appointed, to whom they were required to pay their taxes; but by

this law, the taxes, both of resident and non-resident proprietors, were required to be paid in the county where the lands were situate. The office of county auditor was created, and his duties defined; one of which was to take a list of all lands in his county, according to their proper rate, etc. The auditor of state was required to make out and transmit to the several county auditors "a complete list of all lands, the property of non-resident proprietors, in each of the several counties within the state, and also a complete list of all delinquent lands, whether resident or non-resident, in each of the several counties, with the amount of tax, penalty, and interest charged thereon." In making out the duplicate, it is made the duty of the county auditor to enter the rate and amount of tax charged upon each tract. Nothing is said about his including in the duplicate the arrearages of taxes and penalties accrued before the passage of the act, but it is made his duty to transmit to the auditor of state, by the collector, "a list of all tracts of land within his proper county, in which the taxes have not been paid to the collector for the *current* year." In section 61, it is enacted, "that the sale of all lands, which by the laws now in force would be exposed to sale for the non-payment of taxes, interest, and penalties due thereon, upon the first Monday in December, one thousand eight hundred and twenty, shall be, and the same are hereby postponed until the first Monday in December, one thousand eight hundred and twenty-two." The lands in the section referred to, are those which had been previously twice returned delinquent for the non-payment of the taxes.

It seemed to be necessary to refer to so much of the law of 1820, in order to a correct construction of that of January 30, 1822, "providing for the remission of penalties, and for the sale of lands for taxes." It will be observed, that this law was enacted within the time prescribed for sales of land by the act of 1820. By this law, the state treasurer, and the treasurers of counties, are authorized to receive until the 10th *day of December then next, [184 all arrearages of land taxes which became due previous to the year 1820, with legal interest on each year's taxes from the time the same was due, and if the taxes and interest were paid, then the penalties which had accrued previous to 1820 were to be remitted. 2 Chase's Stat. 1216. This provision did not extend to lands returned delinquent since 1820, the legislature evidently intending to make a difference between the two classes of delin-

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quency, probably because it was supposed that there had been graater irregularity under the former laws than under this, and the penalty, too, was much less under this latter law than under the former.

If the tax and interest are not paid according to the provisions of the second section of this act, then the state auditor is directed to "make out a list, or duplicate, of all land upon which any arrears of taxes, penalties, and interest may still remain due previous to the year 1820, charging each tract, or part of a tract, with all such arrearages of taxes, penalties, and interest, which may actually remain due and unpaid, or remitted as hereinbefore provided, and he shall also add to such charge any taxes, penalties, and interest, which may have accrued on such land since the commencement of the year 1820 and the state auditor shall make out from his general list or duplicate a separate list, or duplicate, of delinquent land within the bounds of each county, as nearly as he can ascertain the same, which he shall certify under his official seal, and transmit the same to the auditor of the proper county."

Section 5 then prescribes the steps to be taken by the county auditor, in order to obtain, on motion, a judgment of the court of common pleas of the proper county, which judgment that court is authorized and required to render, for the amount appearing to be due to the state, together with costs of suit. If the motion is contested, and the contestor requires a jury trial, he is entitled to it. In pursuance of the judgment, the county auditor is authorized to sell the lands, but they can not be sold for a sum less than sufficient to satisfy the judgment. The last section of the act prescribes, that if the land is offered for sale, and remains unsold for want of bidders, "the same shall be considered as forfeited to the state, and shall become the property of the State of Ohio, and be subject to be disposed of as any future legislature may direct."

Under this law, the lands in controversy being in arrear for taxes from 1813, at the October term of the court of common 185] *pleas, 1823, a judgment was rendered by that court, in favor of the State of Ohio, for the taxes, penalties, and interest then due, amounting to $111.60, together with the sum of $5.60 costs. In pursuance of this judgment, the land was offered for sale, on July 12, 1824, but was not sold for want of bidders. Not

being sold, it was forfeited to, and became the property of the state, to be disposed of as any future legislature might direct.

The next act having a bearing upon this case is the act of January 29, 1827, entitled, "an act for the remission of penalties and for the sale of land for taxes." 3 Chase's Stat. 1560. This statute, as is apparent from the first section, is applicable only to lands which were in arrear for taxes previous to 1820. Like the act of 1822, it authorized the treasurer of state, and the respective county treasurers, at any time previous to the second Monday of December thereafter, to receive all arrearages of land taxes which became due previous to 1820, with the interest thereon from the time such taxes became due; and provides, that if the taxes and interest are paid within the time specified, "together with the tax, interest, and penalties accruing thereon subsequent to January 1, 1820, all penalties which may have accrued thereon prior to the year 1820, shall be and the same are hereby remitted." It further provides, that if the taxes, etc., are not paid, the auditor of state shall "transmit to the several county auditors a correct list of the land within their respective counties on which arrearages of taxes are due and unpaid previous to the year 1820, *whether said lands have or have not been forfeited to the state*, charging each tract and part of a tract with all such arrearages of tax and interest which may actually remain due and unpaid prior to that time; and he shall add to such charge any taxes, penalties, and interest which may have accrued on such land since the commencement of the year 1820." The auditor of each county is then required, if these taxes are not paid on or before October 15, 1828, after having given the notice specified in the act, to sell the lands upon which the taxes are in arrear, on the second Monday in December thereafter, at public auction, to the highest bidder. Under the act of 1822 the land could not be sold unless for the amount of the judgment; but under the act of 1827 it was to be sold to *the highest [186 bidder. The county auditor is further required to make to the purchaser or purchasers, "his or their heirs, or assignee or assignees," a deed for the land sold, "which deed shall convey to the purchaser or purchasers, his or their heirs, or assignee or assignees, a good and sufficient title to the land so sold; and such deed shall be received in all courts in this state as good evidence of title to the purchaser or purchasers, his or their heirs, assignee or assignees; nor shall the title conveyed by said deed to the pur-

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chaser or purchasers, his or their heirs, assignee or assigns *be invalidated or affected by any error previously made in listing, taxing,* or *conveying* said land."

In pursuance of this law, the land in controversy being in arrear for taxes since 1813, having been forfeited to the state in 1824, was, on December 8, 1828, offered for sale and sold to one James Woods, he being the highest and best bidder, and bidding twenty-five cents. Wood assigned his certificate of purchase to Andrew Ramsey, to whom the auditor of Fayette county made a deed on June 23, 1829. Ramsey, afterward, and before the commencement of this action, conveyed to Clement A. Buckley, one of the lessors of the plaintiff.

In this sale to Wood, it appears that the taxes were included only up to 1825 inclusive, instead of including all up to 1827, according to the provisions of the act last referred to, and an objection is made to this sale, that this land was not within the act of 1827, it having been forfeited for the non-payment of taxes, as well after as before the year 1820. This forfeiture was under the law of 1822, and the provisions of that act are express that the judgment provided for shall be for the amount of tax due, as well after as before 1820, and there could be no forfeiture for the non-payment of the taxes before that period merely, unless in cases where the taxes after that period have been punctually paid, and it is believed such cases were rare. In truth, at the time of the change of the system in that year, most, if not all, the delinquent lands were subject to sale under pre-existing laws, and would have been sold in the month of December, 1820, had not the sale been postponed by the act of the 8th of February of that year. It seems to the court that the law of 1827 was intended expressly for lands situated as was the land now in controversy and that it might with propriety be sold under that law. It was sold, and for aught that at present appears, we incline to hold the sale legal, especially as it is provided that titles made under the law, 187] in *pursuance of which this land was sold, can not "*be invalidated or affected by any error previously made in listing, taxing, selling, or conveying said land.*"

Considering this sale as having been legal, the lessors of the plaintiff were, by its effect, deprived of the title which they originally had to the premises in controversy, and the same became vested before the commencement of this action in Clement A. Buckley, one of those lessors.

The defendant claims title under a sale of lands forfeited for the non-payment of taxes, made on July 8, 1833. It seems that this land, in the year 1826, was entered upon the tax duplicate in the name of John Clemson, under the law of February 3, 1825, "establishing an equitable mode of levying the taxes of this state" (2 Chase's Stat. 1476), and was, in the fall of that year, in pursuance of the law then in force, returned delinquent for the non-payment of the tax of that year. It was again entered upon the duplicate for the year 1827, and the tax being unpaid, was offered for sale, but was not sold for want of bidders; and not being sold, was, under the law then in force, forfeited to the state. It was sold, in pursuance of this forfeiture, on July 8, 1833, and it is under this sale that the defendant claims title. If the land was properly entered upon the duplicate in 1826, I discover nothing in the subsequent proceedings to vitiate this forfeiture. By the act of 1825, "establishing an equitable mode of levying the taxes of this state," an entire change was made in the system of taxation, so far as the mode was concerned, although not as to the manner of collection. Before the enactment of that law, lands were taxed according to their quality, being distinguished as first, second, and third rate; but by that law they were to be taxed according to their value. This law, however, does not propose to tax lands not the property of individuals or bodies corporate and politic. In the first section, it is declared that the property of such persons, natural and artificial, shall be chargeable with tax. The land in controversy was not the property of an individual, but was the property of the State of Ohio, and it can not be supposed it was the intention of the state to levy a tax upon its own lands. I say it was the property of the state, and it must be so considered, if force is to be given to the law of 1822. Under that law it has been offered for sale to satisfy a judgment for the taxes, and was not sold for want of bidders, whereby it was forfeited to, and became the property of the state. Not being individual property, it was not property *entered upon the duplicate for tax- [188
ation in 1826 and, of course, there could be no forfeiture in 1827. This law of 1825 requires that a list shall be made of all delinquent lands, but it says nothing about forfeited lands, and it was undoubtedly the intention to leave them as they were, to be disposed of as the legislature might afterward prescribe.

On January 18, 1826, an act was passed "providing for the

collection of taxes on lands and town lots, which have accrued prior to the year 1826" (3 Chase's Stat. 1819); and under the provisions of this law, the arrears of taxes upon the land in controversy might have been collected but for the previous forfeiture. That law applies alone, not to forfeited, but to delinquent lands; and, it is believed, that there is no law prescribing the mode of disposing of forfeited land prior to the act of January 29, 1827, before referred to.

But it is said that the taxes for the years 1826 and 1827 were not included when the land was sold for the taxes in 1828. This appears to have been the case, but it does not follow that the land was properly entered upon the duplicate in 1826. The taxes for these years should have been added, and that they were not, is owing to the fault, or mistake, of the agents of the government. The purchaser, under that law, must not be made to suffer on this account; he purchased the land under a law requiring it to be sold for all the arrearages of taxes, up to the time of sale, and he must take it divested of all previous charges of that character.

For these reasons, we are of opinion that the defendant can not protect himself under his claim of title. In truth, he shows no title to the land in controversy.

But it is objected, for the defendant, that the plaintiff can not recover, because the title is not in all his lessors, but in one of them, to wit: in Clement A. Buckley. The objection is well taken; but as this point was not raised upon the circuit, we will not render judgment in the case, but remand it to the proper county, with leave to the plaintiff to amend upon the payment of costs.

189] *JOHN KENDRICK v. WILLIAM Y. FARQUHAR.

The exemption from taxation of lands owned by literary institutions, and of buildings occupied by students under instruction, does not extend to a house occupied as a residence by a professor of the institution, and erected on its lands.

THIS case was adjourned from the county of Knox. It was an action of trespass, for breaking and entering the plaintiff's house.

The defendant pleaded that he entered to distrain for taxes due on the house. The plaintiff replied, that the house was a professor's, situate on the lands of the theological seminary, Kenyon College, and was not subject to taxation. Demurrer to the replication and joinder. In addition to the pleadings, there was an agreed case stating the came facts.

BROWN and MITCHELL, for plaintiff:

The statute of March, 1831 (29 Ohio Stat. 372, 373, sec. 2), enacts, that all lots of land, or ground set apart for school-houses, academies, or colleges, with the buildings thereon occupied for those purposes, and all lands the property of any such academy, or other seminary of learning, which now is, or hereafter may be, established in this state, including all lands granted by Congress for the use of schools, academies, colleges, and for religious purposes (but the buildings, or any of them not occupied for literary purposes, may be taxed), shall be exempt from tax. Under this statute, the premises in question were not taxed; and it is thought that the county authorities do not claim that they are taxable under it, but that they become so under the statute of 1834. We will examine, however, the ground for taxing them under this statute just recited. The only questions that can, or at any time could arise under it, would be, first, is the building on lands belonging to a seminary of learning? This determined, in the affirmative, the next and only question is, is it used for literary purposes? This determined in the affirmative, the property must be exempt according to the express provisions of this statute. It is admitted that the buildings in question are on the land of the theological seminary. The next question, and the one for the court to determine, is, are they (the houses referred to in this case, one of which is described in the pleadings), used for literary purposes, being used as the residences of professors of the college? It does seem that no intelligent mind can for a moment doubt upon this subject. The professors are the most essential part of any institution of learning, and are *there, and accommo- [190 dated there, for literary purposes, and none other. So if any buildings connected with a college are used for literary purposes, those used for the accommodation of professors, the heads of the literary department, surely are.

But it is claimed, by the county authorities, that the statute of 1834 (32 Ohio Stat. 12), providing for the revaluation of real

property, makes an alteration in this particular, and that by section 5 of that act, the house in question is taxable.

This statute declares, section 5, that the appraiser shall "proceed to list and appraise, at its fair cash value, all real estate *made taxable* by the act pointing out the mode of levying taxes, passed March 14, 1831, *conformable with the provisions of said act.* The excess over and above $200 on all houses, *except the property exempted* from taxation by section 2 thereof; all town in-lots, and out-lots, subject to taxation; also all buildings and other improvements, in like manner erected upon, or affixed to, school and college lands, or on lands granted for religious purposes; also all buildings, and other improvements in like manner erected upon, or affixed to, any town lots laid out on such schools and college land, or lands granted by Congress for religious purposes.

The question now presented is, does this statute repeal, or in any way alter the force of the statute of March 14, 1831? It is a rule laid down by Blackstone (vol. p. 1, 89), that one part of a statute must be so construed by another that the *whole* may (if possible) stand. Can, then, this statute be so construed as to give to that clause, in section 5, which points out the property to be exempted, full force, and still make it consistent with the subsequent part of the section, declaring that all buildings, etc., erected on school and college lands, etc., shall be appraised.

To give it such a construction would seem to us very natural, but to some it seems otherwise. It has been contended by those members of the board of equalization, who were in favor of taxing, that the latter part of this section has the effect to repeal the former part and also section 2 of the statute of 1831; still that same board of equalization did not include in their approved list of appraisements the large stone edifice called the college building; and this is a building on the college land; and if section 2 of the statute of 1831 is repealed by the statute of 1834, subject to be taxed under the general expressions in the statute of 1834. But here they desert their strict con-
191] struction *of the last clause of section 5 of the statute of 1834, and let in section 2 of the statute of 1831, with all its force. According to their own acts, then, the question, in regard to taxing the houses in controversy, seems not to be in reality one of the construction of the statute of 1834, but as to what shall be the construction of that of 1831; for if they would but exempt one

building on school or college lands, they consequently give up their strict construction of the latter clause of section 5 of the statute of 1834, which reads also, *all buildings* and other improvements, etc., and resort to the statute of 1831 to exempt that one. If, then, the statute of 1831 be in force to exempt one, it is in force to exempt all which are included in the clause which exempts that one. Hence, then, according to the acts of the county authorities, the true question is, what shall be the construction of section 2 of the statute of 1831, to which they must have resorted to exempt the college edifice? The question arising on that section we have already discussed.

But go upon the supposition that the board of equalization have refused to exempt any, even the college building, and the question is, does the latter clause of section 5 of the statute of 1834, above referred to, meddle with the plain force of the first part of that section and the statute of 1831? Are they repealed by it, or are they consistent with it, and it with them? The first part of section 5, in the law of 1834, exempts all exempted by section 2 of the law of 1831; and the latter clause of section 5 requires *all* improvements, buildings, etc., not above exempted, to be appraised; namely, all buildings, and other improvements, on school and college lands, not used for literary purposes.

This construction clearly gives force to every part of these statutes, and makes them consistent.

We know it is a rule of law, that subsequent statutes shall control the provisions of former ones repugnant to them; but to this rule there are exceptions, depending on the intention of the legislature. In this case, however, we contend that the latter statute is not repugnant to the former. But grant that it were so, what would appear to be the intention of the legislature? Certainly not to repeal the act of 1831, else why refer to it in the first part of said section 5? On this point, see Pease *v.* Whitney, 5 Mass. 380; Capin *v.* Glover and others, 4 Mass. 305.

When a statute is made, in addition to another statute, on the same subject, without repealing any part of it, the provisions of *each must be construed together, *reddenda singula singulis.* [192 Pease *v.* Alwood, 13 Mass. 324. The law of 1834, then, if connected with that of 1831 at all, must be considered an addition to it, for it is an additional regulation of the mode of levying taxes. Render, then, these two statutes together, if possible, so as to let

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both stand, and give to the terms of each a subject to operate upon. The court will, no doubt, give them such construction, and exempt all manner of property from taxation, under the statute of 1834 that would have been under that of 1831.

CURTIS, for defendant:

Whether the *locus in quo* be properly listed and taxed in the name of plaintiff, is a question entirely waived; and that intended to be presented (as agreed by counsel) is, whether the property be at all taxable.

The statute of March, 1831, vol. xxix, 262, 263, sec. 2, exempts from tax all the lots of ground, or land, set apart for school houses, academies, and colleges, with the buildings thereon, occupied for those purposes; and all lands the property of, or granted for the use of, such academy or seminary of learning; but adds a *proviso*, that the buildings, or any of them, not occupied for *literary* purposes, may be taxed.

Section 5 of the act of 1834 (32 Ohio Stat. 12) requires the appraiser to list and appraise the excess over $200 on all houses, except the property exempt by section 2 of the former law; "also all buildings and other improvements, erected on, or affixed to, school or college lands."

1. Does the act of 1831 exempt from taxation a dwelling house built on college lands, and occupied by a professor?

It is contended by plaintiff's counsel, that the word "*literary*" is of such general import, with reference to college institutions, that it embraces the *residences* of all persons necessarily employed in and about the seminary; and especially those of the professors. This argument seems to be predicated upon the false hypothesis, that whatever is connected with a *literary* institution; or attached to it for comfort, convenience or support, becomes *literary* itself; and is entitled to all the benefits and exemptions, secured to the institution in its proper sense. A professor or tutor is certainly a principal, and very necessary officer in a college; but his residence or dwelling house, although very important for the 193] *comfort of his family, is of no more consequence to the institution than would be the dwelling house of a judge, to the administration of justice in our courts of law. The professor is free to choose the kind of house he will inhabit, whether a cabin or the more splendid mansion; and the exercise of that choice does not, in any wise, affect the prosperity of the college.

The same argument that would protect from taxation the professor's house, under the saving clause of the act of 1831, would also embrace a great variety of other buildings; for it is to be remarked that the professor's house is not claimed to be within the exemption because the tenant may be more of a *literary* man than the laborer who supplies the college with fuel or the baker who provides the students with bread, but because it is a necessary appendage to the college. Is it not equally necessary that there should be a boarding-house attached to the college; and because the students board there is that necessarily "occupied for *literary* purposes?" Is it not equally necessary that the students and other members of the institution should be clothed; and does it therefore follow that the clothing store or tailor's shop on the college ground, though exclusively supported by the college, is occupied for literary purposes? The college may institute and support a hotel for the reception of visitors and guests; it may establish a bakery, employ many families in washing for the students, furnishing fuel, etc.; and, to make the expenditures for these comforts light to the student, provide houses for all free of rent. But will it gravely be contended that these various establishments are therefore for *literary* purposes?

The counsel for plaintiff would not probably claim the application of their argument to the extent above given; yet, to my mind, its conclusions embrace all the cases referred to. And its error consists in failing to distinguish between those buildings which are occupied as *part* of the institution itself and those which are *attached thereto* for its comfort and convenience. Thus the counsel, in the concluding part of their argument, embrace in one class, as exempt from taxation, all houses built on the college lands, and occupied by students for *lodging*, recitation, or study; by *professors, tutors, librarians;* for libraries or literary societies. Now here are a variety of purposes of habitation, many of which are utterly dissimilar. For instance, the recitation and study rooms (of which there are several buildings distinct and separate from the main college buildings, yet belong to the same and occupied for those purposes) and the houses built for *libraries and literary [194 societies, none of which are claimed to be taxable, may readily be distinguished from the lodging or boarding-houses of the students and the dwelling-houses of the president, professors, tutors, or librarians. The former constitute a component PART of the insti-

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tution itself, while the latter are attached for the *convenience of individual* persons connected with the institution. That some of these houses may be assigned to their occupants free of rent does not in any degree weaken the distinction here made. Whether any, and what rent should be charged by the superintendent, under the direction of the trustees, is a sheer question of expediency, to be determined by the discretion of the proper officers; and the exercise of that discretion, either favorably for the tenant or more rigorously against him, can not change the character of the occupation.

I do not admit that the practice under the statute of 1831 has been to exempt from taxation professors' houses and the other buildings attached to colleges above considered. That in some counties such a construction may have obtained is probable; but that fact can have no sensible bearing upon the question submitted to the court. The true construction of the statute is now sought for by both parties; and former errors, if any have prevailed in practice, should not influence the decision.

But there is another view that will greatly aid in finding the true interpretation of this law. The first part of section 2, in the statute of 1831, designates by name, in a manner that can not be misunderstood, the property which shall be exempted from tax: "All lots of *ground* or *land* set apart for *school houses*, *academies*, or *colleges*, with the *buildings* thereon *occupied for those purposes*." What purposes? I answer, from the obvious meaning of the text, for the purpose of such *school*, *academy*, or *college*. This, so far as involved in the present suit, is the exemption—the whole of the exemption. And the subsequent *proviso* is surplusage, and unnecessary for the purpose of reserving the taxing power over other items of property. If, then, the section or clause creating the exemption ended here, without the addition of the proviso, could it be construed that the legislature intended to include such buildings as in no wise constitute the school-house, academy, or college, proper or improper, nor any part thereof? If not, let us see if any *enlargement* of the exemption can be obtained from the subsequent *saving* clause.

A *proviso* never substantially grants a power or right; but it is a clause introduced as a condition and caution, to guard against
195] *the too extended operation of a preceding enactment. It is intended to limit and restrict the section of the law in which it

is placed, not to enlarge its operation. Why, then, is this *proviso* looked to as the passage in the law that exempts the property named in plaintiff's replication? Is it claimed that the benfits granted by this section are increased, enlarged, extended by it? If so, the learned counsel do violence to the general and technical meaning of the word, and its legal use and application. I commend them to Walker and Webster.

The legislature, cautious beyond necessity, and fearing that the exemption of the lands belonging to schools, academies, and colleges from taxation, might be construed to include all houses built upon such lands, interposed the *proviso* to guard against such a construction. The word "*literary*," as used in the sentence, must therefore be taken as meaning nothing more than was expressed in words before used. They had exempted school-houses, academies, and colleges; they had exempted the lands owned by those institutions; but they excepted from these exemptions buildings *not* occupied for literary purposes, obviously implying the buildings which they had already designated. This construction of the section renders the whole sensible, preserves the general use and meaning of the *proviso*, and gives to each member of the sentence definite meaning and purpose.

2. The interpretation which I have given to the act of 1831 aids me in arriving at the true meaning of the legislature in the law of 1834. Whether, by the clause quoted from the last-named act, it was intended to remove any doubts that may have previously existed, or induce uniformity of construction and practice in the different counties, may be a question worthy of consideration; but is rendered unnecessary to discuss in this case, from the view already taken of the former act. I do not believe that the legislature intended, by the act of 1834, to repeal or change the law as it was enacted, by section 2 of the act of 1831. Nor is it necessary for the defendant in this case to assume that ground, as is erroneously supposed by the plaintiff's counsel, in their argument. On the contrary, it strikes my mind, as clearly expressed on the face of the statute, to be the *intent* to preserve, in full vigor, the same exemption contained in section 2 of the act of 1831, and nothing more nor less.

Statutes in *pari materia* must be construed with reference to each other; and by the application of this rule, we may frequently arrive at the *intent* of the legislator, when, without it, we would

196] *be left in a labyrinth of doubt. True, the literal meaning of the following words: "Also all buildings and other improvements erected on, or affixed to school and college lands," would require a construction that would utterly defeat so much of section 2, of the previous act, as relates to buildings. But such a construction would be repugnant to the preceding part of the same section in which this clause is found, and which re-enacts the exemption contained in the former statute. Hence it becomes necessary to compare these enactments with those that before existed on the same subject, and which the legislator is supposed to have had in his view when he made the new law.

By applying this principle to the sections of the law under consideration, it can not fail to be perceived that these general words contained in the act of 1834 are subject to the exemptions designated in section 2 of the act of 1831, to wit: "*School-houses, academies, or colleges*, and the *buildings occupied for those purposes.*" The ends contemplated are to be considered, and general words may be thereby restrained. 3 Maule & Selwyn, 510.

Ut res magis valeat, quam pereat, is the maxim of the common law, and is sustained and preserved by the construction I have given to the two statutes. A different one would do violence to this principle. "This interpretation furnishes matter for each statute and every clause to work and operate upon." A different one renders parts of the statute insensible, and involves repugnancy and confusion.

Judge GRIMKE delivered the opinion of the court:

Section 6 of the act of 1834 requires the appraiser to list and appraise the excess, over and above $200, on all houses, except the property exempted from taxation by section 2 of the act of 1831. He is also directed to appraise all buildings, and other improvements, in like manner erected upon, or affixed to any town lots, laid out on such school and college lands. The act of 1831, which is thus referred to, exempts from taxation all lots of ground set apart for school-houses, academies, and colleges, with the buildings thereon occupied for those purposes, and all lands the property of, or granted for the use of such academy, or seminary of learning; but it, at the same time, declares that the buildings, or any of them, not occupied for literary purposes, may be taxed. I do not know that there is any material difference between these

laws. Both agree in exempting *certain buildings from [197 taxation, and both agree in rendering certain other buildings liable to taxation. The act of 1831 describes both; the act of 1834 refers for a description of one class of these buildings to the act of 1831. It was evidently the intention of the legislature to confer an advantage upon these institutions, which are of such unspeakable benefit to the state, and by declaring even a monopoly in this respect to countenance and sustain the monopoly of learning generally. In so doing, we have imitated the examples of other states, in which controversies like the present have sometimes sprung up.

Two or three cases, I believe, have grown out of the laws exempting certain property of Harvard University from taxation. All that we have to do, is, to give a plain construction to the statute, for if, on the one hand, it should be said, that a law in aid of the interests of learning should be favorably expounded, on the other, it may be replied, that wherever a special exemption, from certain duties, is contained in a statute, that the rule of liberal construction is not the guide.

It appears that the house on which the tax was assessed, is used as a dwelling-house by one of the professors in Kenyon college; a connection with that institution is thus shown, inasmuch as he is one of the faculty; but this is not sufficient. It is not enough that the person residing in the house is one of the teachers; it must be shown that the building is occupied for literary purposes. I acknowledge that the distinction is not very broad; and there are some distinctions so nice, that no mind would make them unless it was compelled. But this is not one of such a character. A house merely occupied as a dwelling-house, and not as a place where any of the exercises and recitations of the college are had—a house whose size and value may solely depend on the extent of a professor's family, not one of whom have any connection with the college, can not be said to be a building "occupied for literary purposes," within the meaning of the law. It is true, such houses might be used for such purposes; but then, to the same extent that they would be withdrawn from taxation, certain other buildings, which are now exempt, would be unnecessary, and would not exist. The conclusion is, that this property was by law liable to be taxed, and the demurrer is sustained. Judge LANE, being a trustee of the theological seminary, Kenyon College, did not sit in this case.

198] *STEPHEN HIGBY v. GEO. F. WHITTAKER AND SARDIS BURCHARD.

Examination of, and decisions upon the evidence

A purchaser of land, who has paid a very small part of the purchase money, and delays payment of the principal sum long after it is due, can not be aided in equity by a decree for a specific performance.

In such case, where the purchaser has occupied the land sold, the fair rent of which is equal to the actual payment, the vendor may rescind without offering to refund the amount received.

RESERVED in Sandusky county.

The bill of complaint states, that the defendant, Whittaker, on September 10, 1833, contracted to sell to the complainant a certain tract of land, in the county of Sandusky, lying on the Sandusky river, in the Whittaker Reserve, and called the "Orchard Farm;" also, 90 acres in the same reserve, and lying northeast of the aforesaid tract, the whole to contain 347 acres; for which the complainant was to pay $3,000 in equal annual installments; the first payment to be made on April 1, 1836, with interest on the whole sum.

The complainant avers, that he has paid upward of $500 on the contract, and been in the possession of the land since the purchase. He charges Whittaker with fraudulent misrepresentation in the quantity of the land, and that it was ascertained by a survey, subsequently made, that it fell short of the quantity represented 117 or 118 acres. That at the time of the purchase, Whittaker had sold the last-named quantity, which he concealed from the complainant, but took him over the whole, and represented it as belonging to himself. That the 117 or 118 acres was a valuable part of the farm, and intended to supply it with wood and timber, and deducting it from the 347 acres has materally lessened the value of the whole.

The complainant also states, that the defendant, Whittaker, refuses to receive payment, deducting a reasonable compensation for the deficiency, or to purchase in, and convey the same land contracted for; but has commenced a suit in ejectment, to recover possession of the land occupied by the complainant, and that Burchard, the other defendant, has since purchased of Whittaker, with full knowledge of the complainant's rights.

The bill prays that the damages sustained by the complainant may be ascertained, for the deficiency, and deducted from the amount of the consideration; that any balance due may be paid into court, in a reasonable time, and that, on the payment thereof, that Burchard may be decreed to convey to the complainant, and that further proceedings in the action of ejectment may be enjoined.

The defendants have both answered. Whittaker admits the *contract with the complainant, and his possession; but [199 denies, absolutely, that he represented himself as the owner of any land he had previously sold; or that he contracted any such to the complainant. He avers he was the owner of more than sufficient land, in the Whittaker Reserve, to fill his contract with the complainant, and that he was, at all times, anxious to receive his money, and fulfill, on his part, but that the complainant failed and refused to make the payments, as they became due; that he commenced an action of ejectment, but finding the complainant disposed to be litigious, and having become embarrassed, in consequence of not receiving his money, he was compelled to sell, at a great sacrifice, to Mr. Burchard, and, on March 21, 1835, conveyed to him by deed, and assigned to him the complainant's bond, for the payment of the land. He admits the payment of $492.

Burchard admits his purchase, with full knowledge of the complainant's contract and possession. He states that on April 1, 1836, and on the succeeding day, all the installments being due, he demanded payment of the complainant, and, on that condition, offered him his land, and a conveyance, in all things in pursuance of his contract with Whittaker; but that the complainant wholly refused to make payment, and he thereupon notified him that he should cancel the contract, and should not afterward convey. To these answers, there is a general replication.

Boalt and Seaman, for the complainant, cited 9 Cranch, 173; Sug. on Vend. 262, note; 3 Cranch, 270; Cox's Dig. 128, sec. 13; 12 Wheat. 574; Cox's Dig. 141, sec. 162; Chit. Eq. Cas. 61, 49; 17 Ves. 349; Chit. Eq. Cas. 46; 9 Johns. 470; Chit. Eq. Cas, 221, 222; Amer. Ch. Dig. 518, tit. Agreement, secs. 55, 359; 5 Cranch, 262.

Coffinberry, for the defendants, cited 7 Ohio, pt. 2, p. 97.

Judge Wood delivered the opinion of the court:

Two questions only arise, in this case, necessary for consideration. The first is, whether Whittaker was guilty of fraud, as charged in the bill? The second, whether Burchard, under the facts disclosed, could rescind the contract, without refunding to the complainant the purchase money admitted by the answer to have been received? The fraudulent misrepresentation complained 200] *of, is unequivocally denied in the answer, and must therefore be proved by the testimony of more than one witness. The evidence of Isaac Harris and David Camp are alone relied upon to establish that fact. The former testifies that he witnessed the contract for the sale of the land. That on the day it was executed, Whittaker showed the complainant and the witness, the land contracted for, and called the "Orchard farm," and said the south line continued east, straight to the river, and that the north and west lines were straight. If this representation was made, it was certainly untrue, for exhibit "D" shows a conveyance, within the lines pointed out, on the north side, and west of the Port Clinton road, which divides the farm, of 100 acres, to Nicholas Mattia; and exhibit "E," a conveyance of 50 acres, on the south side, to Brown. Both conveyances executed before the complainant purchased, and which left the lines of what remained unsold, on the north, south, and west, anything else but straight. If Whittaker was showing the lines of the reserve, however, within which the farm was located, and not the lines of the farm, what he said was strictly true. We are inclined to believe this was the fact, and that he was misunderstood by Harris. We arrive at this conclusion, from the evidence of Mattia, to which we shall hereafter refer.

Camp swears that he surveyed the land; that both the complainant and Whittaker were present. He says that the complainant objected to the crookedness of the lines of the "Orchard farm," and Whittaker replied, "*I thought you understood it.*" This is the testimony to prove the fraud! an act, which, if not legally, is *morally* criminal, and tends to the degradation of any individual, in the opinion of every upright and virtuous man. Does it establish it? If Harris is to be believed, there is the testimony of him, only, against the oath of the defendant, and the complainant must throw some other circumstances into the scales, to incline them in his favor. Is the evidence of Camp sufficient? We think not. The

reply of Whittaker, "*I thought you understood it*," can not be tortured into the admission of a fraud, by any legal rule. The testimony of Mattia, however, settles this point, beyond controversy. He swears, before the complainant purchased, he, the witness, showed him the lines of the "Orchard farm," and the lines of the other tracts, sold to himself and Brown, by Whittaker, and told him the price paid, to which the complainant replied, it was cheap enough. The fraud, *not being made to appear, the com- [201 plainant is entitled to no abatement of price.

2. Could Burchard rescind the contract? $492 only had been paid, when the last installment fell due. Nearly $3.000, including interest, remained. In Remington v. Kelley et al., 7 Ohio, 103, it is said, "where there has been a default, unless the same has been occasioned by circumstances not within the control of the party, he can not well complain that the opposite party should not hold himself bound by a contract, of which he, himself, is utterly regardless. That such default is, at least, equivalent to an express assent to a rescission of the contract, and may be so considered, unless acquiesced in by the opposite party." In this case, the whole purchase money was due. Burchard had succeeded to the rights of Whittaker, and stood in his shoes. He demanded payment, and, on that condition, offered to give up the complainant's bond, and to convey, in all things, according to the contract of his co-defendant. Payment being refused, he expressly notified the complainant he should thereafter consider the contract as rescinded. The complainant has shown no one circumstance to excuse him, and relieve him in equity. The law requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform, by him who would resist a rescission of his contract. Burchard manifested his intention in express terms. The complainant satisfied himself with sleeping on his rights, and to the present time has never offered to perform. It is very evident he had no such intention. Several witnesses swear that he often so expressed himself, and as often admitted his entire inability. If prosecuted, he threatened a "*seven years' litigation*," and to reimburse himself for the expense by keeping possession of the property and receiving the profits. This trifling indisposition of the complainant, his want of intog-

rity and intention to pay for the property, and his utter inability to do it, unquestionably give Burchard the right to put an end to the contract.

But it is said, before the contract can be rescinded, the money paid must be refunded. Such, as a general rule, is correct. But, in this case, it is conclusively shown that the complainant is equitably indebted to the defendants for the use, rents, and profits 202] *of the property, to a much larger amount than he has paid. Justice would, in such case, seem to require that the amount paid by the complainant should be considered as so much paid for the rent and profits, and, as the case and parties are all before us, there would be a propriety in decreeing against the complainant for the balance which will still be due. The whole controversy would then be at an end. This is not sought by the defendants, however, and we will, therefore, leave the parties to settle such portion of the rents and profits as remains due, in another tribunal.

We are aware that a number of cases may be found where lapse of time has not been considered a sufficient objection to a specific execution of the contract. Without a close examination, this has led to an opinion that where a contract for real property is once obtained, the purchaser acquires rights which may be enforced in equity to an indefinite and unlimited period, however regardless such purchaser may be of the conditions of such contract. Nothing can be more erroneous, and nothing, certainly, more repugnant to sound morals, or destructive to punctuality. The case of Gibbs v. Champion, 3 Ohio, 325, has been supposed to sustain such position. If carefully examined, we think no such inference can be drawn from it; but it will be found perfectly consistent with the more modern cases of Scott v. Field and Remington v. Kelley, 7 Ohio. In Gibbs v. Champion, a specific execution of the agreement was decreed, because Champion had held on to the contract, and done no positive act manifesting an intention to take advantage of the non-performance of Gibbs, and the court, from that and other circumstances, thought he intended to waive such default, and the contract was considered as subsisting. There is not an intimation, in that case, which fell from the court, that denies the power of Champion to have put an end to his agreement with Gibbs, had he sought to do so.

On the whole, we are clearly of the opinion, in this case, that the bill should be dismissed at the complainant's costs.

Judge LANE did not sit in this cause.

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*LESSEE OF H. STODDARD v. JACOB MYERS. [203

Judgment reversed pending a bill to subject land to satisfy it, and again recovered, the bill being continued, and a supplemental bill filed to reach the case of the second judgment, an alienation after the reversal and before the second recovery, is affected by the lis pendens.

THIS cause was adjourned from the county of Montgomery, and came before the court upon facts agreed. The property in controversy was the north half of in-lot No. 80, in the town of Dayton. The plaintiff derived title under certain legal proceedings between Geo. Beitz and David Wolf; the defendant's title was direct from Wolf, through intermediate conveyances.

At September term of the common pleas, 1831, Beitz recovered a judgment against Wolf for upward of $2,000. Finding no property whereupon to levy, Beitz, September 8, 1831, filed a bill in chancery against Wolf and his children, to subject the half-lot in question to the payment of his judgment. June, 1832, the judgment of Beitz v. Wolf was reserved, in the Supreme Court, and the cause remanded to the Montgomery common pleas to be proceeded in, where it was docketed, September, 1832. It came to be tried again in March, 1833, and Beitz again recovered a judgment. Before the filing of the original bill, or the obtaining of the first judgment, Wolf had conveyed the half-lot to his children. These, in September, 1832, conveyed to J. H. Lesher, who conveyed to the defendant, Myers. The bill in chancery was regularly continued to June term, 1833, when a supplemental bill was filed, alleging the recovery of the new judgment, and asking, as asked in the original bill, that the court decree a sale of the half-lot for the satisfaction of the judgment. In 1835, the court decreed the sale prayed for, at which the plaintiff lessor became the purchaser.

Lesher, the purchaser from the Wolfs, had no notice, in fact, of

the claim to subject the half-lot to the satisfaction of a debt due to Beitz, and under this defénse the defendant claimed protection. The plaintiff maintained that the *lis pendens* was conclusive notice.

STODDARD, for the plaintiff:

The rule is believed to be well settled that whatever is sufficient to put a party upon inquiry, is sufficient notice of every fact, that, upon such inquiry, he might with reasonable diligence have learned.

So it is settled, by repeated decisions, that a suit which draws property in question, incidentally or collaterally, is such *lis* 204] **pendens* as affects a purchaser of such property, with constructive notice. As in the case of Gouth *v.* Ward, 2 Atkins, 174, the chancellor held that a suit by devisees against the heir to perpetuate testimony, and to establish the will, was such a *lis pendens* as affected a purchaser of the property with notice.

So in the case of Culpepper *v.* Aston, 2 Chancery Cases, 115, 221–223, where land had been conveyed to executors in trust to pay debts, etc. A bill was filed by the heir against the executors for an account, alleging that the land was not wanted to discharge the debts, and during the pendency of that suit the executor sold the land. It was held that the suit for an account was notice to the purchaser. Upon an account taken, it turned out that the land was not necessary for payment of the debts, and the purchaser (Aston) lost the land, notwithstanding he purchased without any actual notice of the trust, and paid the full price of the land. See Barnes *v.* Canning, 1 Chancery Cases, 301, and 1 Johns. Ch. 575, 579.

In a case of Wattington *v.* Howley and others, 1 Desaussure, 168, which was a bill against an executor for an account of assets and pending the suit she sold a certificate of public debt which belonged to the estate, the court held the sale void.

That the suit of Beitz *v.* Wolf and his children was a *suit pending* from September 15, 1831, and that it was in a course of continued prosecution is clearly shown by the record of the cause, and can not be denied. The inquiry is then presented, whether the pendency of that suit was such notice to Lesher and Myers, both of whom purchased the subject matter of that suit, while it was pending, as affects them with notice; for if it is, *the purchase is void*, and Beitz and the plaintiff claiming under the decree, in his cause, need not take notice of a title so acquired. Ludlow *v.* Kidd,

3 Ohio, 542, 354; Bennett *v.* Williams, 5 Ohio, 462; Self *v.* Maddax, 1 Vern. 459; Murray *v.* Ballan, 1 Johns. Ch. 565. And the same authorities establish the position, that a *lis pendens* is notice *per se.* The chancery suit was pending from September 15, 1831, as before stated, and was in a course of continued and diligent prosecution, and from that time Lesher and Myers had constructive notice of every fact that is averred in the bill, and it does not absolve them from the legal consequences of that notice, that the judgment at law, one of the facts mentioned in the bill, was afterward reversed on error; for the existence of that judgment, is only one of many facts that are *alleged, and notwith- [205 standing the reversal of the judgment, the suit in chancery remained *pending* and in prosecution until the final decree in the Supreme Court at the June term, 1835, by which the lot in question is subjected to sale according to the prayer of the bill. It is not the facts alleged in the bill (except so far as they show the complainant's claim upon the property, or subject of the suit by direct averment or necessary inference), that affects a purchaser with constructive notice, but it is the simple fact, that *a suit is pending.* That of itself is notice.

The argument that no decree could be rendered upon the original bill in this cause, without the supplement, is not sound, for many cases may be supposed where no decree could be made in the cause without the aid of a supplement; as if, after a cause is at issue, it is discovered that it is necessary to bring new parties before the court, as in the cases before stated, and a supplemental bill is filed for that purpose. The filing of such supplemental bill will not do away the effect of the original bill as *litis pendentia,* and yet no decree could be rendered in the cause without such supplement. Nor has a suit any the less effect upon a purchase made *pendente lite,* that the decree to be made upon the hearing does not operate directly, but only incidentally, upon the property in controversy; as in the before-cited cases of Gauth *v.* Ward, and Culpepper *v.* Anton, no decree was or could be rendered operating directly upon the property, and yet those who claimed by purchase were not the less *pendente lite* purchasers and consequently affected with notice, upon the principle that their attention was necessarily drawn to the claim to the property, adverse to the title of those under whom they claimed.

The defendant's counsel has referred to cases to be found in the

Condensed English Chancery Reports, as sustaining positions taken in argument, one of which is, "that a supplemental bill can not be filed to supply the title of an original bill," and the case of King *v.* Judock, 2 Cond. Eng. Ch. 503, was cited.

That was a suit in chancery by the assignees of a bankrupt, who by statute are prohibited from bringing any suit without the consent of the creditors or commissioners, "*testified in writing under their hands.*" This want of authority to institute the suit was set up in defense. The plaintiff then filed a supplemental bill, alleging that since filing the original bill they had obtained the authority of the commissioners to bring the suit. To the sup-
206] plement there was a demurrer, which was sustained *on the ground that the statute requisition of such authority was necessarily precedent, and that the authority subsequently obtained could not be considered as *ab initio* authorizing the suit. It was a statutory requisite to the bringing of the suit. The application of the case to the one before the court is not perceived.

Another position is, that "*lis pendens* does not hold good if the decree is founded on a supplemental bill, filed after sale of property;" and the case of Kinsman *v.* Kinsman, 4 Cond. Eng. Ch. 581, is cited. The lord chancellor, in that case, says the question was, "*whether there was or was not a lis pendens,*" and that "*to constitute a litis pendentia there must be a continuance of litis contestatio;*" and after examining the facts in the case, he says, "*upward of a quarter of a century has elapsed*" since the decree was pronounced in the original suit, and he therefore held that the original suit was not pending, and that the bill filed as a supplement was not of that character; and the purchase having been made after the decree, etc., in the original suit, and before filing what was intended as a supplemental bill, there was no *litis pendentia* of the original bill, of which the purchaser was bound to take notice.

The case of Beits *v.* Wolff, etc., is not of that character, for the record of that suit shows that there was not only *litis pendentia*, but also *litis contestatio*, in the strictest sense, from the time of filing the original bill.

Another position is, that a "supplemental bill can not be filed to change altogether the grounds of the original bill," and authorities are referred to as sustaining the position. On examination,

it is not perceived that the authorities sustain the position, nor is the application of such a rule to the case in question perceived.

P. P. and R. P. Lowe, for defendant:

Does the first bill operate as a *lis pendens* to the purchaser, Leasure, who bought after the reversal of the judgment at law, as described in the first bill, and before a new recovery was had, and of course before the supplemental bill was filed, and was it after the reversal of the first judgment reasonably sufficient to put the purchaser upon his guard?

The reversal of the judgment set forth in the original bill operates as a direct and certain suspension of any further action in the chancery suit. The *life* of the bill was depending on that of the judgment it describes, and by destroying the judgment, *the fate of the bill is sealed. Its equities and ground work [207 are stripped from it, so as to satisfy the law of its insufficiency to operate as notice. The sole object of this bill being that of getting satisfaction of the judgment it describes, and no other claim, the purchaser then, on examination, finds no such judgment as the bill describes; he even finds no judgment that would operate as a lien itself (were the legal title in the lot in question in Daniel Wolf), or be the basis upon which a bill could be filed, were the legal title fraudulently out of Daniel Wolf. The court will not ask so unreasonable a thing, as to require him who is looking out for that which may reasonably be sufficient to put him on his guard, that he should run into a new conjecture, as to what the future may bring forth, or enter upon a prophecy as to what may be the probable course of things. A second recovery for the same cause of action would not relate back as a lien to the date of the first judgment. The law will not assume greater strength for the bill than is given to the judgment itself. The reversal of the judgment at law, it is true, is not in *fact* a reversal of the chancery proceedings, yet it is so in effect. Suppose A. files a bill to satisfy a judgment he has recovered against B. by making lot number ten liable; after the bill is filed for this sole object, A. amends or files his supplemental bill, praying that lot number 11 may be held liable to satisfy the judgment described in the first bill. D., between the filing of the first bill, and that of the amended or supplemental bill, buys lot 11. The first bill in this instance would not operate *as a lis pendens* to D.

But perhaps the more important question to be decided in this

case is, whether the amended or supplemental bill as it is called, relates back in such a manner as to place its contents and allegations into the first bill, or, in other words, to have the same effect as if they were placed there. And in viewing this branch of the subject, we will, first, deny that the amended or supplemental bill filed by Beits, as between the purchaser under the decree, and the grantee of an innocent *bona fide* purchaser, is, in truth, an amended or supplemental bill to the one originally filed, in the sense of the authorities. The defendant, in ejectment, contends there is no connection, as the court will perceive. It has no relation back, because the facts it contains are not new discoveries—not new discoveries, because they had no existence at the time of the purchase. In making up the final decree, no allusion could be had to any fact contained in the original bill, no reference to it 208] was necessary to do what the complainant *desired. If, then, the last bill filed, be not an amended or supplemental bill, the suit in chancery is inadmissible in this case as evidence. See 2 Mad. 404–409. It is also inadmissible because it was filed without leave of the court. See same authority. But an amended, or supplemental bill, can not be filed to supply the title of an original bill. See 2 Cond. Eng. Ch. 503; 2 Sim. & S. 265; 2 Young & Jarvis, 475; 2 Mad. 50. Nor can a supplemental bill be filed to change altogether the grounds of the original bill. See 6 Cond. Eng. Ch. 286. But even if the court should determine the supplemental bill well filed, yet, inasmuch as Leasure was an intermediate purchaser, after reversal of judgment, and the supplemental bill filed long after the sale to him, it could not operate as notice. See case of Kinsman *v.* Kinsman, 4 Cond. Eng. Ch. 581.

The case referred to by Mr. Stoddard, in 3 Ohio, 352, furnishes rather a strong case for the defendant in one point of view. "That the reversal of a decree in chancery, which confers a title, actually divests it, and reinvested it in the person where it rested before the decree was made." True it is, there was strictly no reversal of the suit in chancery, but everything which made up the complainant's claim to equity was completely destroyed, and as effectually as if a reversal took place.

A bill of *reviva* was filed in this case, upon the suggestion of Daniel Wolf's death. Bills of *reviva*, as well as supplemental bills,

do not necessarily refer back to the commencement of original suit. See 3 Ohio, 341, 541; 5 Ib. 461.

The common practice is, for a purchaser first to examine the recorder's office for conveyance by deed, or mortgage; then he goes to the clerk's office, and finds no judgment against Daniel Wolf that would operate as a lien, or upon which a bill could be filed, so as to make the property held by his children liable to pay it. If a purchaser does all this, and finds these results we might suppose he ought to be satisfied. The most astute and wary man in community would be satisfied with such a result, and purchase; yet Leasure bought, precisely under these circumstances, fairly and innocently obtaining title, for the consideration of $1,400. The consideration might be proof positive of his ignorance of a lien, or notice of incumbrance, as he gave double what was paid for the pemises under the decree.

*Judge LANE delivered the opinion of the court: [209

The general rule that no alienation of property is permitted whilst a suit is pending in relation to it, either in law or equity, is familiar and well settled. 3 Ohio, 542; 5 Ohio, 462.

It is assumed that when the right to recover, in the bill in equity, was taken away, by the reversal of the judgment, the suit ceased to be pending, so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems plain that by the institution of a suit, the subject of litigation is placed beyond the power of the parties to it; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. This suit, instituted in 1831, was regularly continued until the final decree in 1835. The supplemental bill was engrafted into the original bill, and became identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation. Judgment for plaintiff.

RICHARD DOUGLAS, ADMINISTRATOR OF WILLIAM MCDONALD, DECEASED, *v.* ALEXANDER WADDLE ET AL., ADMINISTRATORS OF JOHN WADDLE, DECEASED.

A general judgment against a decedent in his lifetime, can not be revived against the heirs alone, without showing that there is no personal representative in esse, and that the heir has received assets by descent from the ancestor.

THIS is a proceeding by *scire facias* to revive a judgment.

It is stated in the declaration that at the September term of the Supreme Court, 1830, in the county of Ross, William McDonald recovered judgment against John Waddle for $2,351.34 debt, to be discharged by the payment of $1,879.74, the amount due in equity, together with his costs, amounting to $19.61. That five years have elapsed since the date of said judgment; that the same remains unreversed, unsatisfied, and wholly unpaid, and that the said John Waddle has, in the meantime, died intestate, leaving the defendants, his children, and heirs at law, and real representatives.

It is further stated that the said William McDonald has died intestate, and that Richard Douglas, the plaintiff, has been appointed his administrator, and accepted the trust. The defendants are then called upon to appear before the court, etc., and "show cause, 210] if any they have, or can show, why they and each *of them should not be made a party to said judgment, and why the same should not be revived, and execution awarded against them as the heirs of the said John Waddle, deceased, in the name of the said administrator of the said William McDonald, deceased, in pursuance of the statute in such case made and provided," etc.

To this declaration there is a general demurrer.

DOUGLAS and LEONARD, for plaintiff.

SWAN, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The object of this *scire facias* is to revive a dormant judgment, and to revive it against the heirs of the judgment debtor, in favor of the administrator of the judgment creditor. In the shape now presented, it is somewhat of a novel proceeding, and is intended to be in pursuance of a provision in the practice act of 1831, which,

it is believed, has never received a construction, and which we have found it somewhat difficult to construe.

By section 37 of the "act regulating judgments and executions," passed February 1, 1822 (2 Chase's Stat. 1822), provision was made that where there were unsatisfied judgments against a testator or intestate, or against their executors or administrators, the judgment creditor might, at any time within five years after the rendition of those judgments, have a *scire facias* issued against the heirs of the judgment debtor, provided those heirs held land by descent. The object of this provision manifestly was to subject the lands of a deceased person to execution. This law was repealed by an act having the same title, passed February 4, 1824 (2 Chase's Stat. 1297), but this latter act contained substantially, if not literally, the same provision. It was under this law that the case of McVickers *v.* Ludlow's Heirs, 2 Ohio, 246, and the case of the Union Bank of Georgetown *v.* Adm'rx and Heirs of Meigs, 5 Ohio, 312, were decided. This act was repealed by the "act regulating judgments and executions," passed March 1, 1831 (29 Ohio L. 101), and this particular provision was not re-enacted. But, at the same session of the legislature, the "act regulating the practice of the judicial courts," was revised (29 Ohio L. 58), and the provisions introduced, in pursuance of which this action is brought.

In section 85 of this act (29 Ohio L. 74), it is enacted that if execution is not taken out on any judgment within five years *after judgment rendered, such judgment shall become dor- [211 mant, and shall cease to operate as a lien upon the estate of the judgment debtor. In section 86, "that if said judgment still remain unsatisfied, it shall be lawful for the plaintiff, his heirs, executors, or administrators, to bring and maintain an action of debt on such dormant judgment against the defendant therein, his heirs, executors, or administrators; or such plaintiff, his heirs, executors, or administrators, may, at his or their discretion, revive, by writ of *scire facias*, sued out of "the court rendering such judgment, or from the court having the power to award execution thereon, any such judgment remaining unsatisfied, and have execution thereof, against the defendant, his heirs, executors, or administrators." This section is but a continuation of the preceding laws for reviving dormant judgments. It contains no new provision. It seems to contemplate that a judgment may be re-

vived against heirs, but the practice under it has been to revive in personal actions against personal representatives.

Section 89 is in continuation of the same subject, but nothing like it has before been enacted in the state. It is in these words, "that if either the plaintiff or defendant shall have died, after final judgment, and before satisfaction thereof, it shall, or may, be lawful, for the plaintiff, or if he shall have died, then his representatives, real or personal, *as the case may require*, to cause the defendant, or if he shall have died, then his representatives, real or personal, *as the case may require*, to be made a party to such judgment, by writ or writs of *scire facias*, to be issued, served, and returned in the same manner that a summons may be issued, served, and returned, by law; and such judgment may be rendered, and execution awarded in the premises, as might, or ought to be given, or awarded, against the representatives, real and personal, of a deceased party, in other cases."

In this section, the words "*heirs*," "*executors*," "*administrators*," are dropped, and the words "*representatives, real and personal*," introduced; but I am not aware that there is any substantial difference between sections 86 and 89, except that one relates to dormant judgments, the other to judgments not dormant; and, in giving a construction, the two may be well taken together. The judgment may be revived, in favor of or against the "*representatives, real or personal, as the case may require.*" It would be an obvious construction, to hold that the revival is to be limited to *personal* representatives, where the judgment is in the *person-*
212] *alty*, and to *real*, where it is in the **realty*. And we should undoubtedly take this to be the meaning, were it not that by section 86, the election is given to bring an action of debt, or to revive by *scire facias*. The action of debt can not be founded upon a judgment in the realty.

But has the plaintiff a right to proceed against the real or personal representative at his election? Taking section 86 by itself, and giving it a literal construction, I see nothing to prevent him. This, however, could never have been the intention of the legislature. By our law, the lands of a deceased person may, when the circumstances of the case require it, be made assets in the hands of personal representatives for the payment of debts. Even those which are incumbered by judgment, may be sold by an administrator under an order of court, without any other restriction

than that the avails shall be first applied to the satisfaction of the judgment. If an estate is not sufficient to pay all its creditors, the debts are to be paid in a ratable proportion. It can not be supposed that the legislature intended to interfere with these principles. But if a judgment creditor can at once proceed against the real representatives, they would be in a great measure defeated. By recurring to section 89, we find that the proceeding to revive shall be against "the representative, real or personal, *as the case may require.*" The question then arises, under what circumstances does the "*case require*" that the proceeding shall be instituted against one, under what circumstances against the other of these representatives? If the judgment is in the realty, it must unquestionably be against the real representatives. But if in the personalty, then against either, "*as the case may require.*" Confining my attention to this act alone, I am free to say that I do not see how a satisfactory answer can be given to the question last propounded. But by turning to another law, passed at the same session of the legislature, which must have been at the same time under consideration, and which, in part at least, is upon the same subject, the difficulty is solved. I refer to the "act regulating the duties of executors, and administrators," passed March 12, 1831. 29 Ohio L. 229.

This act is a revision or compilation of the former laws on the same subject, and contains also some new provisions. Section 42 provides that, "at the expiration of five years from and after the decease of any person, if the executor or administrator of such decedent shall have made final settlement with the court, and if not then, so soon as such final settlement shall be made, all lien upon the real estate of such decedent for the *payment of any claim against his or her estate, not pre- [213 sented to such executor or administrator before such final settlement, should cease and determine," etc. Then follows the next section, in these words. "That nothing in the preceding section contained shall impair the personal liability of heirs and devisees for the payment of any claim against the estate of their ancestor or devisor; but such heirs and devisees shall remain liable to the full extent of the assets by them received from the estate of their ancestor or devisor, for the payment of all claims against the estate of such ancestor or devisor; *and any suit which could be brought or sustained against such ancestor or devisor, were he alive, may be*

brought and sustained against such heirs and devisees, after the executor or administrator of the ancestor or devisor shall have made final settlement with the court, until the assets so received by said heirs and devisees shall be exhausted." Taking this section of the law regulating the duties of executors or administrators, in connection with the sections of the practice act before considered, and there seems to be a good and substantial reason for the provision contained in these latter sections, and there certainly can be no impropriety in thus considering them. They were simultaneously before the general assembly, and constitute parts of one and the same system. One law was signed on the 8th, and the other on the 12th of March; and taking all these provisions together, there is no difficulty of construction. If, after the death of a judgment debtor, the judgment creditor must revive his judgment, he must proceed against the personal representative, if there be one. But where there is no longer any personal representative, then he may proceed against the real representatives, and these latter will be liable to the extent of assets descended. Or, in the language of the statute, he may proceed against one or the other, "*as the case may be*," or, in other words, as the case may require.

If the proceedings are against the real representatives, what ought to be shown in the *scire facias*? Undoubtedly it ought to appear that there are no personal representatives, or that those appointed have made their final settlement with the court; and it ought further to appear, that assets have descended whereby the heirs can, with propriety, be charged with the payment of the judgment. None of these things appearing in the present *scire facias*, it is defective, and the demurrer must be sustained. If, however, the plaintiff thinks he can make a case, he may take leave to amend, upon the payment of costs.

214] *HEIRS OF DAVID FRENCH *v.* JACOB FRENCH AND E. HICKOX.

A contract made in such a state of intoxication as to deprive the party of his discretion and ordinary judgment, will be set aside in equity, although the other party had no agency in producing the intoxication.

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The discontinuance generally of a bill, after answer, replication, and proofs, is to be regarded as a final decree for the defendant, unless specified to be dismissed, by leave of the court, without prejudice.

THIS case was adjourned from the county of Geauga.

It was a bill in chancery, in which the complainants sought to have a contract for relinquishing an equitable interest in lands, made by their ancestor, rescinded upon the ground of fraud. The fraud was specifically alleged in the bill; one principal ingredient of which was, that Jacob French, taking advantage of David's addiction to intemperance, procured him to be intoxicated, and in that condition induced him to transfer his interest in the lands in question to Hickox, who paid no consideration. The answers are directly responsive to the bill, and flatly deny all its allegations. Voluminous proofs were taken, and upon these elaborate arguments were submitted to the court. The principal question involved was the issue in fact upon the truth of the charges made in the bill. The report is confined to the legal points involved.

JOHN C. PAINE, for complainant.

T. FORD and R. HITCHCOCK, for the defendant.

GRIMKE, J., delivered the opinion of the court:

That a court of equity will interpose in such a case as that made by the bill, is too clear to be denied. It was once supposed to be the law, that a deed obtained from a drunken man could not, for that cause, be avoided. But a more rational rule now prevails; and the law now regarding the fact of intoxication, and not the cause or author of it, and regarding that fact as affording proof of a want of capacity to contract, which is one of the elements of every agreement, will interfere to relieve. Thus, if a deed is obtained by the exercise of an undue influence over a man whose mind is incapable of acting freely and voluntarily, such deed will be decreed to be canceled. The difficulty, generally, has been to settle what degree of intoxication is sufficient to show the want of a consenting understanding. And as to that, it is evident that no universal rule can be laid down, since it is the deprivation of mind which the law has regard to, which may be very different in different individuals under the same circumstances of intoxication. But the plaintiff has failed to substantiate the case made in his bill. He has, to be sure, adduced testimony, which, if it were not countervailed by the *testimony taken by the defendant, [215

might be sufficient to induce very strong doubts whether there had not been great unfairness in the transaction; but all his allegations are met by evidence direct and positive, and which take from the court the power to decree a rescission and cancellation of this deed. It must be an exceedingly strong case which would authorize the annulling an executed agreement; indeed, the distinction between a bill to perform, and to rescind even an executory contract, is too familiar to need to be repeated.

Before dismissing the bill, it is necessary to notice one fact of the case which has occasioned us some difficulty. It appears that there was a former suit between the same parties, and in regard to the same subject matter, and that after proof had been taken, and the cause was ready for hearing, that the complainant voluntarily discontinued his suit. The term "discontinuance" is one which is exclusively known in proceedings at law, and the complainant should regularly, if he intended not to preclude himself from the privilege of instituting a new one, to have had the bill dismissed without prejudice. In Gichell *v.* Logan, 14 Ves. 232, Lord Eldon says: "If a party thinks proper to bring his cause to a hearing upon examination of witnesses, publication passed, and the cause capable of being opened, and then makes default, it is very difficult, and would be rather mischievous to treat such conduct merely as a nonsuit at law. But the defendant," he says, "has waived the benefit that may have arisen from the former decree by not pleading it." We have not considered the former decree as a bar; but a conformity to the established practice in chancery, as well as safety to all concerned, demands that, in future, the bill should be dismissed without prejudice, instead of being entered discontinued.

216] *Lessee of Rice *v.* Apollos White.

The county auditor's certificate of a sale of land for taxes, upon the death of the holder, passes to the heir at law.

This case was adjourned from the county of Portage.

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Judge Wood stated the case, and delivered the opinion of the court:

The plaintiff's title, in this case, is derived from a deed made by the county auditor on a sale of land for taxes. The certificate of purchase was made to William Wetmore, who died before obtaining a deed. William Wetmore's executor assigned the certificate to Edwin Wetmore, who assigned it to the lessor of the plaintiff, to whom the county auditor executed a deed.

The only question to be decided is, whether, upon the death of William Wetmore, this certificate passed to his heir, or to his personal representative. Although a court of equity regards a mortgage as personal property, and the money secured by it goes to the personal representative, yet there are special cases in which it is treated as real property that descends to the heir. Toller, 182; 2 Pow. M. 682, 698.

Charters and deeds, court rolls, and other evidences of title to land, as well as the chests in which they are kept, descend to the heir. Tol. 189; 3 Bac. Abr. 65; 4 Term, 229.

The certificate of purchase does not convey a legal title, but it is evidence of an equitable title to the land, and enables the purchaser to call in the legal title. And it savors so strongly of the realty that in our opinion it descends to the *heir*, and is not assets in the hands of the executor.

The act prescribing "the duties of county auditors," provides that such certificates shall be assignable in law, and vest in the assignee, or his legal representative, all the *right* and *title* of the original purchaser.

The words "*legal representative*," used, as they are, in connection with the certificate of purchase, or evidence of realty, we construe to be the heir, to whom the *realty* descends.

It follows, then, that the heir only could legally transfer the certificate of purchase, and, consequently, no legal title is vested in the plaintiff's lessor, by the deed, which is predicated on a *void* assignment. Judgment for the defendant.

217] *FREDERICK STIVER, JR., SURVIVING ADMINISTRATOR OF CASPAR STIVER, SEN., DECEASED, v. HEIRS OF CASPAR STIVER, JR., AND HOLDRYE AND JOHN STIVER, ADMINISTRATORS OF CASPAR STIVER, JR.

A bill in equity may be an appropriate remedy for settling accounts between executors and administrators of different estates.

An executor or administrator is accountable for everything he receives in which the decedent had an interest, notwithstanding any contrivance by which an attempt may be made to become receiver, in a different character.

A purchaser of the legal title to lands having notice that such legal title was a trust for a decedent, takes the land subject to the trust.

THIS is a suit in chancery, reserved in the county of Montgomery.

The facts appearing from the bill, and the answer of John Stiver, are as follows: In July, 1821, the execution of the will of Caspar Stiver, deceased, was duly committed to the plaintiff and Caspar Stiver, jr. Among the debts returned by the executors as due to the estate, is the amount of a note given by Caspar Stiver, jr., to C. Stiver, sen., for $943, which note, with certain other assets, were held by C. Stiver, jr., in his character as executor. In 1825, C. Stiver, jr., died, without completing the settlement of C. Stiver, sen.'s, estate; John Stiver is his administrator, and both estates are yet unsettled.

Before the death of Caspar Stiver, jr., he had conveyed certain lands to Susanna Swartzley, by a deed, absolute on its face, but, in fact, subject to redemption. After his death, in 1825, an agreement was made between John Stiver, his administrator, and his heirs, to whom the equity descended, that John Stiver might sell the interest of the heirs. Accordingly, in 1825, he contracted to sell it to Holdrye for $1,300, and Mrs. Swartzley conveyed it to him under this arrangement, receiving from him her debt of $590, which was charged upon it, and the remainder was paid to John Stiver.

The objects of the bill are, to take an account between the surviving and the deceased executors of Caspar Stiver, sen., to enforce the due settlement and distribution of the estate of Caspar Stiver, jr., and to enforce the appropriation of the fruits of the sale to Holdrye to the debts of the last decedent.

The answer of Holdrye sets up a purchaser for a valuable consideration, without notice.

CRANE and STODDARD, for plaintiff.

ODLIN and SCHENK, for Holdrye, present the following points:

1. There is no sufficient proof of C. Stiver, jr.'s, indebtedness.

2. Creditors should recover judgment at law before going to chancery.

*3. Personalty must be exhausted before a recurrence to [218
the realty is permitted.

4. It does not sufficiently appear but that lands remain in the hands of heirs, which should be first subjected to debts. Wright, 261; 6 Ohio, 227.

5. But aside from all arguments having reference to the formality or informality of the pleadings, the defendant, Holdrye, defends his right and possession of the land upon a broad ground of equity. He purchased from the administrator, by and with the consent and advice of the heirs, who have since ratified and confirmed his title; and the purchase money, or so much of it as was not applied directly to the debts of the intestate, went into the hands of the administrator; that money was, and is, therefore, chargeable in the hands of the administrator as assets of the estate, and if he has squandered it or become insolvent, then the creditor must look to the securities upon his bond. It is not pretended that Holdrye paid for the land a full and adequate consideration. Who are affected by the informal sale? Not the heirs—it was made with their approbation, and all of them have since confirmed it. Not the creditors, for if the property had been sold by order of court, on petition of the administrator, there is no proof that it would likely have brought more, nor, indeed, any probability that it would have produced so much, to the estate as it did when disposed of to Holdrye at private sale. By the statute, the heirs are to be made parties defendant to an administrator's petition, but not the creditors. This is to prevent a sacrifice of the real estate, it is true, as well as to divest them of their legal title, but the creditor is not entitled to a day in court; and it will be found that in those cases where sales have been held void, for want of sufficient order to sell, such decree of avoidance has been for the benefit, and on complaint of heirs. The case of Piatt v. St. Clair's Heirs is no exception to this; for, in that case, the court held the legal title to be still in the heirs, the sale by the administrator to the trustee being fraud-

ulent and void, and the purchase of the land by the heir at the tax sale "not changing the estate as to creditors." 6 Ohio, 227. It is not pretended that every sale made by an administrator, with consent of the heirs, must conclude the rights of creditors. But it is contended that every such sale is *prima facie* sufficient, even as to creditors, and that they have no right to look after the land, but must follow the money in the hands of the administrator. There 219] might be collusion *between the heirs, administrator, and purchaser, in consequence of which the land might have been sold for less than it was worth; but it would be necessary to aver and show such collusion and inadequacy of price, in order that the creditor should still maintain his lien. Suppose the case of a small insolvent estate, where it shall become necessary to resort to the land for the payment of debts, and where the expense of filing a petition against the heirs, and procuring an order to sell, may bear a large proportion to the value of the land to be sold; shall not the heirs and administrator be permitted to save this expense to the estate and to the creditors, by consenting mutually to an advantageous private sale? It would be a hard rule that would drive them into court under such circumstances; and, at least, we think that it should be required of the creditor, who afterward objects, to make out a case of collusion or unfairness in the sale, before he shall be allowed to follow with his debt the land in the possession of the purchaser.

It can not be objected, that the money received thus by the administrator is not assets in his hand, for the faithful application and disbursement of which his securities will not be held responsible. On the contrary, it is maintained, that when the heirs, being adults, have notice, and consent to the sale, and afterward, in fact, ratify it, everything has been done that would have been effected by making them parties to a formal statutory proceeding by petition, and it would be making a very refined distinction, indeed, to claim that the proceeds, actually received by the administrator, do not as much, in the one case as in the other, go into his hands *as administrator*, to be accounted for in that capacity. It might be contended, on the same principle, that whenever an administrator compromises a claim of the estate which he represents, or in any matter exercises a discretion not expressly pointed out among his duties by the statute, he is acting in an individual, not in an official capacity, and the securities on his bond are dis-

charged from liability. More latitude than this must be allowed, a more liberal and equitable construction of the powers of a legal representative, or their ability to benefit the interests which they represented would be greatly and unnecessarily abridged.

We find no cases precisely resembling this, but refer to two or three as to the exercise of power by an administrator.

Where an administrator had released an equity of redemption, *and the heirs released, the court quieted the title of the [220 purchaser. 5 Ohio. 540.

If an administrator consent to the sale by heirs of the real estate of the intestate, he divests himself of any right which he might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property. 3 Blackf. 331.

6. The purchase of Holdrye was of the legal title without notice.

Judge LANE delivered the opinion of the court:

That a bill for an account may be sustained between executors, or between a surviving executor and the representative of a deceased executor, is a plain consequence of their relation as joint tenants. The jurisdiction of a court of chancery, for the settlement of decedents' estates, has been sustained, at the instance of creditors, before judgment, because it is a trust. 6 Ohio, 112; 6 Johns. Ch. 631. For these objects, therefore, the plaintiff is entitled to a reference to the master.

Some of the other points argued, do not properly arise in this stage of the cause. Proof of indebtedness must be made to the master; all questions relating to the order of marshaling assets will be presented by his report. As other matters have been argued, and must be determined in the progress of the case, it is convenient to settle them now.

The administrator of C. Stiver, jr., not contesting his liability to account with the creditors of his decedent for all assets in his hands, insists, that the money arising from the sale of the land being produced from the realty, by the aid of those holding the legal title, without the license or authority from the court of probate, was not received by him in his representative character, but as the agent of the owners, and that, consequently, it can not be regarded as assets; but the law makes it his duty to convert the realty into the means of payment of debts, and no collusion

will be permitted between him and the heirs, or between him and the trustee of the legal title, by which it can be withdrawn from the fund. It may justly be presumed, that the parties intended nothing more than to raise money for the payment of the debts by sale of the land, without the expense or delay of judicial proceedings. In the agreement filed, the parties making it are described to be the heirs of Caspar Stiver, jr., and John Stiver, his 221] administrator. If creditors, for whose benefit such a *sale ought to have been made, choose to affirm it, it is too late for John Stiver to evade his responsibilities by disclaiming the character in which he acted.

Holdrye claims protection, as a purchaser, for a valuable consideration, without notice. The evidence does not sustain his claim. He knew of the existence of the bond for reconveyance from Swartzley before his purchase, and he dealt with John Stiver, and paid him his part of the money as administrator, entitled to the fruits of the sale.

Holdrye further claims, that the payments made by him to John Stiver, being in fulfillment of a contract, with which Stiver is chargeable as assets, should avail him as valid payments, and discharge the land from the lien of the decedent's debts.

The purchaser of lands of a decedent at a judicial sale of an administrator, holds it discharged of liens for debts, 6 Ohio, pt. 1, p. 70; because the administrator, to secure those for whom he acts, gives a bond, whose amount is fixed with reference to the amount of assets he is likely to receive; and the court, which confers the power to sell, may require adequate security; the protection of such a purchaser is the steady policy of the law. But heirs, holding land of their ancestor, hold it subject to his debts; a purchaser from them takes the incumbrance with the title, 3 Mass. 540; 4 Ib. 354; 5 Ib. 242; 6 Ib. 151; 6 Ohio, 237; and no circuity of conveyance, no collusion or management among the holders of the interests, will free the land from this burden, or clothe such a conveyance with the immunities attending a sale, made under the sanction of the court.

Since, then, the land was acquired by Holdrye with a knowledge of the interest of the decedent, he will hold it chargeable with his debts, if it be necessary to pay them. It does not follow, that the land must be resold; it is one of the advantages of a recurrence to equity, that its decrees may be modified according to cir-

cumstances. If the land produced its full value, the holder may be holden to the application of the purchase money; but the court will lend a facile ear to suggestions of ill faith, collusion, and fraud, and may direct a resale in all cases, at the instance of creditors, for a higher price.

The first recurrence, however, of creditors, of an estate, is against the personal representative. If satisfaction can be had there, it is unnecessary to reach over beyond them. The case is referred to a master, under the usual order, to take an account, and all further questions are reserved until the hearing.

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*Lessee of Benjamin Hill v. Samuel West et al. [222

Where a husband has received property with his wife and used it, it is a good consideration for a conveyance of land to her use.

A release from a prior to a subsequent mortgagee operates only an extinguishment of the prior mortgage.

Where a wife joins her husband in executing a deed of general warranty, she is estopped by her covenant from setting up a subsequently acquired title.

Motion for a new trial.

This is an action of ejectment for the recovery of 200 acres of land, in lots Nos. 26, 27, and 31, in the township of Twinsburgh, in the county of Portage. It was tried by a jury in the county of Portage, and a verdict returned for the plaintiff, subject to the opinion of the court on the following facts:

Both parties claim title under Moses and Aaron Wilcox, who were legally seized of 4,000 acres of land, situate in said township, of which the two hundred acres in controversy are a part. The plaintiff introduced in evidence.

1. A deed from Moses and Aaron Wilcox, and their wives, Huldah and Mabel Wilcox, to Robert and Polly Hurd, dated January, 7–10, 1822, conveying the 200 acres in controversy.

2. A deed from Robert and Polly Hurd, to Hannah and Mabel Wilcox, for the same lands, dated January 7–10, 1822.

3. A deed of mortgage from Moses and Aaron Wilcox, and their wives, for the same lands, to the lessor of the plaintiff. This deed is dated November 10, 1823, was acknowledged the same day, and

contains the usual covenants of general warranty. It was recorded on November 27, 1827.

4. A record of a suit in chancery, by which the equity of redemption was foreclosed at the October term of the court of common pleas of Portage county, 1832. This suit was in the name of Hill, the lessor of the plaintiff, against Huldah and Mabel Wilcox, their husbands having died before the filing of the bill.

The defendants then introduced in evidence:

1. A mortgage deed for the whole 4,000 acres of land, owned by Moses and Aaron Wilcox, which deed was executed by the said Moses and Aaron and their wives, to John Mitchell, Levi Hull, Lewis Clark, Elisha Lane, and Dan. Parmalee. This deed was dated and acknowledged on April 3, 1823, and recorded on May 8th, of the same year, and contains covenants of special warranty. In connection with this deed, they offered proof that the condition of defeasance had not been complied with, whereby the deed had become absolute at law.

2. A deed from Elisha Lane, one of these mortgagees, conveying his interest in the mortgaged premises to the defendant. This deed bears date April 25, 1827.

223] *3. Similar deeds from Dan. Parmalee and John Mitchell, two others of the mortgagees, dated April 10, 1827.

4. A similar deed from Lewis Clark, another mortgagee, dated June 9, 1828.

5. A deed from Huldah and Mabel Wilcox to the defendants, dated April 18, 1829, particularly to convey the land in controversy.

To rebut this evidence, the plaintiff then introduced a power of attorney from the mortgagees in the last-named mortgage to E. W. Bronson, and a deed of release executed under this power to Huldah and Mabel Wilcox, releasing to them the premises in controversy. This deed of release is dated July 17, 1824, and recorded on August 6th of the same year.

There was further testimony in the case, but it was not of that character to require a particular statement of it in order properly to understand the points decided.

WEBB, for plaintiff, cited the following authorities: 2 Kent's Com. 170; 2 Saund. 177, 180; 7 Mass. 21, 291; 4 Bibb, 436; 3 Call, 394; 1 Tyler, 42; 3 Maryland, 409; 3 Greenl. 50; 3 Cranch, 73; 7 Ib. 34; 5 Johns. Ch. 570, 572.

POWERS, for defendants, furnished no argument.

Judge HITCHCOCK delivered the opinion of the court:

On the trial of this case an objection was made to the deed from M. and A. Wilcox and their wives to Hurd and wife, on the ground that no consideration passed at the time the deed was executed. From the circumstances attending the transaction, it is clear that the object was to transfer this land to the women, and that Hurd was made use of as the instrument through whom this might be done. But the testimony in the case shows that M. and A. Wilcox had received and made use of the separate property of their wives for their own purposes, and it was not improper for them to make this settlement upon them, especially as there is no evidence of any design to defraud creditors. If there was anything of this kind, it might make a proper case for the interference of a court of equity.

The facts of the case show that the whole 4,000 acres of land, including the land in controversy, was mortgaged to the *grantees of the defendants in April, 1823. The [224 200 acres were mortgaged to the lessor of the plaintiff in the month of November of the same year. Both mortgage deeds were executed by Moses and Aaron and Huldah and Mabel Wilcox. The mortgagors in the first mortgage on July 17, 1824, released all their interest in the 200 acres in controversy to the two women.

The first question presented for consideration, under this state of facts, is as to the effect of this release.

If a mortgagor is considered as having the legal interest in the lands mortgaged until the condition broken, and that he is to be so considered as to all the world except the mortgagee, has been repeatedly decided by this court, then upon the performance of the condition his estate becomes indefeasible. If the condition of defeasance be the payment of money, such payment destroys the interest of the mortgagee in the lands, and such payment may be proven by parol. By the act of March 12, 1836, "to amend the act entitled an act to provide for the proof and acknowledgment of deeds," etc. (34 Ohio L. 19), it is provided that an entry of satisfaction by the mortgagee upon the mortgage, or upon the record of the mortgage, shall operate as a release of the same to any person who may be entitled to a release. A deed of release, executed

by the mortgagee, of all his interest in the mortgaged premises, must be at least equivalent to the performance of the condition. As the payment of the money secured by a mortgage does not vest a new estate in the mortgagor, but merely extinguishes the lien of the mortgagee, so a release of the premises by the mortgagee to the mortgagor vests no new estate. The release operates to extinguish the claim of the mortgagee, and the mortgagor is in under his original title—not under a title acquired by the release. A mortgagee has not, even after the condition of defeasance has been broken, such an interest in the mortgaged premises that he can convey by release, or other mode of conveyance, to a third person, until the equity of redemption is foreclosed, unless he, at the same time, transfers the debt secured by the mortgage. Neither can lands in the hands of the mortgagee be sold on execution, until the equity of redemption is foreclosed. 4 Johns. 41; 5 Johns. Ch. 570. If we are right in this, then it follows the release to Hannah and Mabel Wilcox operates as an extinguishment of the first mortgage, so far as the same was operative upon the 200 acres of land released.

225] *They acquired no new title by this release, but held the lands in the same manner, and under the same title, as before the execution of this mortgage, and entirely divested of its lien; still the subsequent mortgage to Hill was outstanding. At the time it was executed, the mortgagors had such an interest in the land as could be pledged. It operated as a lien as perfectly as the prior mortgage, except that it was junior in point of time. The former mortgage having been extinguished, this attached as a lien upon the land, as it would have done had that never been executed, and the equity of redemption having been foreclosed, the mortgagee is vested with the legal title.

But if we are wrong in this, and these women are to be considered as having acquired a new title or estate by the release, then the question arises, whether they, or those claiming under them, are not estopped by the covenants in their deed from setting up this title against the lessor of the plaintiff. At the time the deed to the lessor of the plaintiff was executed, they were *femes covert*, and as such could not be bound by their contracts, except so far as expressly authorized by statute. In this, as in most, if not all, the states of the Union, *femes covert* are allowed to convey their real estate by deed, their husbands uniting in the conveyance.

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What in England can be done only by fine, may, in this country, be done by deed thus executed. By our law, however, in order to give the deed validity, the wife must be examined separate and apart from her husband, and, after such separate examination, must acknowledge the deed. This separate examination seems to be substituted for the fine; still, although in England a *feme covert* can, by fine, enter into covenants, which will subject her to actions for damages, yet we are not prepared to say, that under our system, she is bound to this extent by her covenants in a deed of conveyance. On the contrary, we incline to the opinion that she is not thus bound. It seems to be holden otherwise, however, in Virginia. In the case of Nelson *v.* Harwood, 3 Call, 394, it was decided, that if a *feme covert* was privily examined, her covenant in a deed for further assurance is obligatory, and the specific performance of such covenant was decreed. Notwithstanding this case, however, we entertain the opinion that full effect is given to the statute providing "for the proof, acknowledgment, and recording of deeds," etc., 29 Ohio L. 346, when we hold that a deed executed by a *feme covert*, in conformity with that act, operates to convey the estate contemplated.

*It is not necessary, however, definitely to settle this [226 question, nor do we intend to do it; for it does not follow, because a *feme covert* could not be made liable in damages for the breach of her covenant of warranty, that therefore such covenants will not operate as an estoppel. We are aware, that in the case of Jackson *v.* Vanderhayden, 17 Johns. 167, Judge Spencer, in delivering the opinion of the court, says, that a deed executed by a *feme covert*, in conjunction with her husband, containing covenants of general warranty, does not operate as an estoppel to her subsequently acquired interest in the same lands. This, however, is the only American case we have found sustaining the same doctrine. On the contrary, in the case of Collard and another *v.* Swan and wife, 7 Mass. 291, it is expressly decided, that where a wife joins with her husband in the conveyance of her lands with covenants of warranty, the land passes by the deed, and the wife is estopped by her covenants, although she is not answerable for any breach of them. The same principle is recognized in the case of Fowler *v.* Spencer, 7 Mass. 21. Such seems also to be the rule of decision in Kentucky. 4 Bibb, 436.

These decisions may not seem to be founded upon the reasons

which are usually assigned, why the covenants in a deed should operate by way of estoppel, that is, to prevent circuity of actions, still they seem to us to be reasonable, and such as tend to the furtherance of justice; and when a married woman undertakes, in conjunction with her husband, to convey her land with covenants of warranty, it is sufficient to protect her from the payment of damages for the breach of those covenants; for all other purposes they should be held operative. If, then, after the execution of the deed to the lessor of the plaintiff, Huldah and Mabel Wilcox acquired title to the premises in controversy, that title inured to the benefit of the lessor of the plaintiff, and neither they, nor those claiming under them, shall be permitted to defeat the plaintiff by setting up this after-acquired title. Motion for new trial overruled.

227] *JAMES PEDAN v. ADMINISTRATOR OF H. ROBB.

Guardian appointed in Pennsylvania, receives assets of the ward and removes with both to Ohio, and dies without settlement. The ward can sustain a bill in equity for an account against the guardian's personal representative in the courts of Ohio.

RESERVED in the county of Guernsey.

Judge GRIMKE stated the case, and delivered the opinion of the court:

This is a bill in chancery. It charges that James Pedan, deceased, was the father and guardian, appointed in Pennsylvania, of the complainant; that it became necessary to sell real estate in that state, and for that purpose an act of the legislature was passed authorizing the sale of the ward's lands, and directing the investment of the proceeds in stocks, and other safe funds. That in pursuance of this act a sale was made, the money received by the guardian, but that it was never invested; that the guardian removed to Ohio, bringing his ward with him; that they both became domiciled here; that the guardian died here, and that Robb, the defendant, is his administrator. The bill is filed to obtain an account, and to it there is a general demurrer.

Objections are made at the very commencement to this whole course of proceeding, as contrary to the policy of our laws and as inconsistent with the mutual comity, which should subsist among independent states; that, in fact, there is an entire want of jurisdiction in the courts of Ohio, the defendant's intestate having been appointed guardian by the probate court in Pennsylvania, where alone he could be called to account, and rendered responsible for any misconduct in the discharge of his duty.

This view is not founded upon any express adjudication, but it is compared to the case of an original administration granted in another state, or in a foreign country; and, it is affirmed that in analogy to what has been declared to be the law in that case, no such suit can be instituted in Ohio. The general principle to which allusion is made is this, that "no suit can be brought by or against a foreign executor or administrator in the courts of the country in virtue of his foreign letters testamentary or of administration." This principle has been firmly settled in Great Britain, and has been acknowledged by many of the courts of the United States. 2 Ves. 35; 3 Cranch, 319; 4 Rand. 158; 2 Gill & Johns. 493; 5 Mass. 67; 4 Mason, 16; 20 Johns. 229; 3 Day, 74. But it must be recollected that the law of Ohio has, in some measure, departed from this general maxim. It authorizes an executor, or administrator, *appointed in any other state, by [228 virtue of that authority alone, to prosecute any suit here. This provision, however, does not, by any necessary implication, involve the liability *to be sued* in Ohio; that has been supposed to stand upon different ground. The distinction between a principal and an ancillary administration — between an administration granted in the state where the testator or intestate was domiciled, and one obtained in a state where he had merely left property, has been fortified by a number of recent decisions, and more particularly by a train of them in Massachusetts; and yet it is doubtful whether the original meaning of that rule has not been impaired and frittered away by the conclusions to which some of these very decisions lead, for in Dawes *v.* Boylston, 9 Mass. 323, it is held that an administrator appointed there is held to return an inventory of the intestate's effects, although execution can not issue against him. In Richards *v.* Dutch, 8 Mass. 506, it is decided that an administrator, ancillary to the principal one in a foreign country, may be compelled to pay the testator's debts to creditors

in Massachusetts; and in Dawes *v.* Head, 3 Pick. 128, which is a very elaborate and learned opinion, the same doctrine is repeated, and the administrator, in that state, is held bound in all cases, even where the estate is insolvent, to pay the debts due to citizens in Massachusetts; he is to pay *pro rata*, but without regard to any fanciful preference which may be given to one species of debt over another, and it is only where there is any residuum left, that it is to be remitted to the country where the original administration was granted.

The question now is, what application have these principles to the case of a guardian? We have seen that the distinction between a principal and an ancillary administration, after all, resolves itself merely into a duty, in the latter case, to retain the funds long enough to ascertain whether the whole estate, abroad and at home, will be solvent or insolvent, as regards all the creditors, foreign and domestic, and does not involve an exemption from being sued; so that the agreement, drawn from analogy, does not assist the respondent.

In Morrel *v.* Dickey, 1 Johns. Ch. Cas. 153, it was held, that letters of guardianship, granted in another state, could not be recognized in New York. The learned chancellor so decides upon the strength of the adjudications in the case of a foreign administrator, and does not seem to be aware of Morrison's case, cited in 229] Sill *v.* Worswick, 1 H. Black. 665. Mr. *Morrison, being a bond creditor of the respondent, was under a commission of lunacy in England, and the respondent removing into Scotland, his committee (or guardians) instituted a suit there. The court of session decided that the suit could not be sustained there, but, on appeal, the decision was reversed, and the final determination does not appear to have been ever disturbed since. So that, even in Great Britain, an important distinction is taken between a foreign administrator or executor, and a foreign guardian. A guardian does not, like two or more administrators, represent conflicting classes of creditors, residing in different jurisdictions, and themselves residing in different countries. He is not subject to the same disabilities as an administrator, etc. He may remove from the state where he was originally appointed to any other, and, although it was once a greatly controverted question, yet it is now settled that he has even a right to change the domicile of his ward. Pittinger *v.* Wightman, 3 Meriv. 67. The reason

of the doubt was, that the exercise of the right would put it in the power of a guardian to change the succession to the personal property of his ward; a reason which, although it seems to have had great weight with some of the civil-law lawyers, has never entitled itself to much with English or American jurists.

It is evident, that if the present suit can not be sustained, the complainant is without any adequate remedy. If he can not institute a suit in Ohio because the letters of guardianship were granted in Pennsylvania, he can not, for the same reason, sustain one in Pennsylvania, because the defendant was appointed administrator in Ohio, which leads to the last consideration, and one which is alone decisive of the case; that this bill is not filed against the guardian (for he is dead), but against his personal representative, who is completely accountable to the courts of Ohio. There must be a decree, therefore, for the complainant, and a reference to the master, and the same decree and order may be had in the case of Nelson and wife *v.* James Pedan's Adm'r, the circumstance of the complainants living out of the state not distinguishing it in principle from the other.

PARISH, for the complainant.

TRACY, BELL, and HARPER, for the defendant.

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*JAMES G. BIRNEY *v.* THE STATE OF OHIO. [230

An indictment for harboring and secreting a mulatto slave is bad, unless it aver that the accused knew the person harbored was a slave.

THIS was a writ of error, reserved in the county of Hamilton.

The plaintiff in error was indicted for harboring and concealing a fugitive female colored slave. The indictment contained nine counts, in which the offense was variously set out—some of the counts specifying more or less of the particulars of the case, four of them charging that the defendant harbored the slave, well knowing that she was a slave and a fugitive from service. The first count, omitting the form of introduction and conclusion, was in these words:

"That James G. Birney, on March 1, 1837, and for a long time

previous thereto, to wit, for six months, at the township aforesaid, in the county aforesaid, did unlawfully harbor and secrete a certain mulatto girl by the name of Matilda, the said Matilda then being a slave and the property of one Larkin Lawrence, contrary to the form of the statute," etc.

The record shows that, at the trial of the cause, the counsel for the traverser excepted to four different positions ruled by the court.

1. The court ruled that it was competent for the prosecution to prove that the person harbored was the property of Larkin Lawrence.

2. The court refused to charge the jury that the ordinance and constitution of Ohio precluded the existence of slavery within her territorial limits so effectually as that no proof could be received, in her judicial tribunals, that such a condition existed in the state.

3. The proof for the prosecution having shown that the alleged master of Matilda brought her, under his own charge, in a steamboat, to the Cincinnati landing, on the Ohio river, where she remained until she left it for the service of the traverser, the court refused to charge the jury, that by the operation of the ordinance and constitution upon the facts, Matilda became emancipated.

4. The court refused to instruct the jury that it was incumbent on the prosecution to produce and prove the constitution and laws of the state, establishing the condition of slavery under which Matilda was claimed to be the slave of L. Lawrence.

The jury found the traverser guilty on the first count, and not guilty on all the others. The court adjudged him to pay a fine 231] *of $50, the utmost penalty of the law, and the costs of the suit—to reverse this judgment the writ of error was brought. The errors assigned were, the first common general assignment, that the judgment was against the plaintiff in error, when it should have been for him, and, in addition, the errors indicated by the bills of exceptions.

S. P. Chase, for the plaintiff in error:

The count, in the indictment of which the defendant was found guilty charged that he "unlawfully harbored and secreted a certain mulatto girl by the name of Matilda, then *being a slave and the property* of one Larkin Lawrence." The act, under which the prosecution was instituted, makes it a penal offense to "harbor

or secrete any black or mulatto person, *being the property* of any person whatever."

I maintain that it is impossible, in Ohio, to commit the offense of harboring, or secreting a person *being the property* of another person. I maintain that the relation of owner and property, as existing between person and person, has, or can have, no existence in this state; and I maintain these propositions as the inevitable results of a sound interpretation of the constitution of Ohio; and as in full harmony with every provision of the constitution of the United States, and of the ordinance of 1787. If I can establish these propositions as I maintain them, it must follow that so much of this act of 1804, as inflicts a penalty for violating a relation which can not constitutionally exist, must be repugnant to the constitution, and therefore void.

And, certainly, no argument is needed to prove that the relation of owner and property, as between man and man, can not exist under the constitution of Ohio. This instrument declares "that all men are born *equally free* and independent, and have certain natural, inherent, and unalienable rights, among which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." It also declares as a direct consequence of these fundamental truths, "that there shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes;" and that "no alteration of the constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state." From these extracts, it appears, that the one principle which the framers were especially anxious to make *prominently conspicuous, and to surround with [232 safeguards the most impregnable, was the *equal freedom of all men;* and the one thing which they sought to brand with deepest reprobation, and to exclude forever from the institutions of the state, was the *slavery of man to man.* It can not be doubted, then, that were Ohio a distinct and independent nation, no such relation as owner and property could exist, as between man and man; nor could any law, recognizing and protecting such a relation, be of the least validity.

But Ohio is not a separate and independent nation. We regard the federal constitution and the ordinance of 1787, as of higher authority than our state constitution. If these recognize this

relation and sanction it, state legislation may constitutionally recognize and protect it. We must examine, then, and endeavor to ascertain the import of the provisions in the ordinance, and in the constitution of the United States. The provision in the ordinance is in these words—"any person escaping into the same" (*i. e.* the Northwest Territory) "from whom labor or service is lawfully claimed in any one of the original states, may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid." The provision in the federal constitution was obviously taken from that in the ordinance, and is as follows: "No person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such labor or service may be due."

In order to arrive at the true import of these provisions, it is proper to refer to the history of the country at the time when they were incorporated, first into the fundamental compact of the territory and people northwest of the Ohio with the states and people of the Union; and soon after, into that of all the states with each other. It was then acknowledged that, in some of the states, institutions existed so incompatible with slavery, that the slave who might escape into them would become a free man the moment he should enter their territory, while in other states, slavery was recognized and protected by fundamental law and legislative enactments. This state of things is implied in the constitutional provision just cited. Institutions must have existed in some states, by the operation of which, the servant escaping into them, was discharged from his involuntary service, for otherwise this claim would have been nugatory. And Mr. Madi-
233] son, *in the course of the debates in the convention of Virginia, speaking of the condition of things then existing, says: "At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws." The slaveholding states were apprehensive of the losses they might sustain in consequence of this state of things, and all dreaded its consequences to the Union. To obviate the apprehended evil, the clause, which has just been cited, was introduced into the constitution as a clause of compact between the states, similar to the clause which had been just before inserted in the ordinance, and expressly declared

to be a clause of compact between the original states and the people and states of the northwest territory. It was cautiously framed, so as to avoid all recognition of the condition of slavery, or the relation of ownership between man and man. It left the several states free to create, or continue, or abolish such relations between individuals within their several territories as they pleased, just as they had been under the articles of confederation. It required each state to deliver up servants escaping into its territory from other states, to their lawful masters—to deliver them up as servants, not as slaves—far less as property. It bound each state to recognize and protect, in a particular class of cases, the relation of master and servant, as established by the laws of sister states, but no other additional relation. It left the whole responsibility of all other relations upon the states which might establish or continue them. I am very confident that this construction exhibits the true import of this constitutional provision, and the more confident, because the very terms of the provision seem to exclude every other interpretation. For who is to be delivered up? Any person held to service and escaping. Are slaves and human chattels alone held to service? Surely not. To say nothing of servants for hire, there is the great class of apprentices who are "held to service" in the strictest sense of the terms, and are yet neither slaves nor property. It can not be denied that the provision embraces the case of an escaping apprentice, and if so, all argument, whether or not it recognizes property as a relation of one human being to another, must be at an end. It recognizes no such relation. On the contrary, the exact reverse of such recognition is strongly implied.

Another argument that no such recognition was intended, is to be found in the statute books of that period. I refer the court especially to the statutes of Virginia. Tate's Digest, 25, 476, 491. It will be found that those statutes describe three classes *of [234 persons held to service—apprentices, servants, and slaves; and that the right of recapture is provided for in regard to each class. It could not be said then that a statute of Virginia, providing for the recapture of persons held to service, would contain any recognition of the relation of property as between persons. It would only recognize a general relation which might exist, indeed, in connection with that other relation, but might also exist independent of it.

If I am correct in this construction of the constitution and the ordinance, it follows that there is nothing in either which requires or authorizes the legislature of any state to pass laws for the protection of the right of property in human beings. Every purpose intended to be answered by the provisions in either instrument, may be effectually accomplished without any such degradation of the non-slaveholding states. And if so, the provision of the act under which this indictment was found, abhorrent as it is to the whole spirit of our institutions, and to the express provisions of our constitution, must be void.

The second question presented by the record, and the only remaining question to which I wish to call the attention of the court, is this: Was the woman, Matilda, at the time she was employed by the defendant as a servant, the slave of Larkin Lawrence? Admitting, for argument's sake, the prosecution to be constitutional, was the offense, charged in the indictment, actually committed?

Now, it is certain that slavery, wherever it exists, is a creature of positive institutions. It has no support in natural right; on the contrary, it is in direct derogation of natural right. Before slavery can be, natural right must be overborne by force, custom, or legislation. In the language of the highest court in Louisiana, Lunsford *v.* Coquillon, 14 Martin, 401, "the relation of owner and slave is, in the states of this Union, in which it has a legal existence, a creature of the municipal law." In the still more emphatic language of the Supreme Court of Mississippi, Harvey et al. *v.* Decker and Hopkins, Walk. 36, "Slavery is condemned by reason and the laws of nature. It exists, and can only exist, through municipal regulations; and in matters of doubt, is it not an unquestioned rule, that courts must lean *in favorem vitæ et libertatis?*" It is also certain that the municipal regulations of no state have *proprio vigore*, any extra territorial force. "There is no doubt," says Chancellor Kent, "of the truth of the general proposition, 235] that the laws of a *country have no binding force beyond its own territorial limits, and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*, or in the language of Huberus, '*quatenus sine prejudicio indulgentia fieri potest.*'" It is also certain that "no nation is under any obligation to give effect to the laws of another nation, which are prejudicial to itself or its citizens; that in all cases each nation must judge for itself what

foreign laws are so prejudicial or not; and it is only in cases not so prejudicial that a spirit of comity and a sense of mutual utility ought to induce every nation to allow full force and effect to the laws of every other nation." Story on Confl. of Laws, 75.

It is also undeniably true that in all enlightened nations, which do not tolerate slavery, the laws of other states in which it is tolerated, are held to be so prejudicial to the non-slaveholding states and their citizens, and so repugnant to the spirit of their institutions, that slaves held under such laws, cease to be slaves the moment they come within their territories. "It has been decided that the law of England abhors and will not endure the existence of slavery within the nation; and consequently, as soon as a slave lands in England he becomes, *ipso facto*, a free man, and discharged from the state of servitude." Ib. 92. So that the fervid exclamation of Cowper is, in truth, an undisputed axiom of English law:

> "Slaves can not breathe in England; if their lungs
> Receive our air, that moment they are free:—
> They touch our country, and their shackles fall.
> That 's noble!—"

So also in France. "That such is the benign and liberal effect of the laws and customs of that county," is declared by the highest court of Louisiana. Marie Louise *v.* Mariot, 8 Martin, 375. It is then not to be questioned that the comity of nations has in no instance, induced any enlightened state to tolerate the slavery, created by the laws of another state, within its territory. On the contrary, it has been uniformly held by the tribunals of slaveholding states, that slaves, permitted by their masters to reside within the limits of non-slaveholding states, become free, through the operation of their laws. 14 Martin, 401; 2 Marsh. 467; Gilman (Va.), 143. It being true then that each nation and state must determine for itself to what extent it will admit, upon the principle of comity, the laws of other nations and states to operate within its limits, *it remains to inquire, so far as [236 the present question is concerned, how far the State of Ohio admits, upon that principle, the operation of laws that sanction slavery. And the scope of this inquiry is very limited. We have but to turn to the ordinance, and we find the fundamental and unalterable compact, between the original states and the people and states of the Northwestern Territory, that there shall be

neither slavery nor involuntary servitude within that territory, forever. Turning to the constitution of the state, we find the same express interdict reiterated, in the same terms, by the voice of the people. The ordinance then, and the state constitution, expressly prohibit the application of the principles of comity to cases of this description. There is an excepted class of cases, it is true—excepted in the ordinance and excepted in the constitution of the United States, which is paramount to the state constitution. But upon every slave brought within the limits of Ohio, and not embraced within the strict terms of the exception, this great interdict operates with unbroken force. "Independent of the provisions of the constitution of the United States," says Judge Story, "for the protection of the rights of masters in regard to domestic fugitive sales, there is no doubt that the English principle pervades the common law of the non-slaveholding states in America; that is, foreign slaves would no longer be deemed such, after removal thither." Story on Conflict of Laws, 92. The courts of this state then are tied up from deciding any person to be a slave, unless that person falls strictly within the exception of the federal constitution. They have nothing to do with the principles of comity.

What then is that exception? What persons compose that unfortunate class, whose fetters can not be broken by the spirit of our state institutions? The clause creating the exception has been already cited. It provides that no persons held to service in one state, under the laws thereof, escaping into another, shall by any law or regulation therein, be discharged from such service. Persons held to service in one state, and escaping into another, then, compose the class which are not to be enfranchised by the operation of the ordinance and our state constitution. Was the woman Matilda a person of this class? Was she held to service in one state, and did she escape into another? Plainly not. At the time she left the individual who claimed to be her master, she was within the territorial limits of Ohio, by the consent of that individual. If she had ever been a slave, she had ceased to be such that moment when she was brought by Lawrence within
237] *these limits, and she had power to go whithersoever she chose. Her act in leaving Lawrence, under these circumstances, was in no just sense of the term, an escape. It was the first

exercise of that freedom, which the constitution of Ohio had conferred upon her.

I am aware that some decisions can be found which maintain that slaves, traveling with their masters through free states, will not become free; but these decisions, so far as I have become acquainted with them, were made by the courts of slaveholding states, under no solemn obligation to maintain the constitution of the non-slaveholding states, to which they denied, in these cases, its legitimate effect; and I look in vain for any warrant for such decisions. Where is the authority for adding to the class of fugitive servants excepted by the federal constitution from the otherwise inevitable operation of free institutions, another class, namely, that of slaves traveling with their masters? The constitution of the United States declares that the provisions of the state constitution shall not affect the condition of servants escaping from the other states into Ohio, and the state constitution yields to the paramount authority of the federal constitution. And then some judge decides that the state constitution shall not affect the condition of slaves traveling through Ohio with their masters Shall the state constitution yield to this decision? Plain common sense, fortified by every principle of sound construction, answers no, and must prevail.

It follows, then, that at the time the woman Matilda was received into the service of the defendant she was not a slave, or the property of any person, and of course that the offense charged has not been, in fact, committed.

No argument was submitted for the state.

Judge Wood delivered the opinion of the court:

The statute upon which the indictment is predicated enacts, "that if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall, on conviction thereof, be fined any sum not less than ten nor more than fifty dollars." We are first called to consider whether, under this enactment, the indictment is sufficient?

It is required that every indictment shall have a precise and sufficient certainty. The omission of a word of substance is fatal. 2 Haw. P. C. chap. 25, sec. 4. Here the plaintiff in error is *charged with harboring and secreting a certain mulatto [238 girl, by the name of Matilda, the *property of L. Larkin.* There is

no averment that the plaintiff in error *knew the facts alleged*, that Matilda was a slave, and the property of L. Larkin, or of any other person; and such is not the legal inference in a state whose constitution declares that all are born free and equal, and that there shall be neither slavery nor involuntary servitude within its limits, except as a punishment for the commission of crimes. On the contrary, the presumption is in favor of freedom. The *scienter*, or knowledge of the plaintiff in error, of this material fact, was an ingredient necessary to constitute his guilt. This knowledge should have been averred in the indictment, and proved on the trial, for, without such knowledge, the act charged as a crime was innocent in its character. We know of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself. "*Ignorantia facti* doth excuse, for such an ignorance, many times, makes the act itself morally involuntary." 1 Hales P. C. 42.

It is true that the statute, upon which the indictment is founded, omits the *scienter*, and the indictment covers all the facts enumerated in that statute. But this is not sufficient; it can not be assumed that an act which, independent of positive enactment, involves no moral wrong, nay, an act that in many cases would be highly praiseworthy, should be made grievously criminal, when performed in total unconsciousness of the facts that infect it with crime. This court has determined differently. In the case of Anderson against the state, 7 Ohio, part 1, 255, the plaintiff in error was indicted for uttering and publishing forged certificate of deposit, without averring his knowledge of such forgery. The statute under which the indictment was found does not, in express terms, make this knowledge a constituent of the crime. Nevertheless, the court held that the criminality could not exist without the knowledge, and that an indictment did not aver it was defective. That case runs upon all fours with this, and the further investigation of the principles upon which it is based confirms the court in the conviction that it is correct. This judgment must be reversed for this cause, and it thus becomes unnecessary to decide upon the other points, so laboriously argued for the plaintiff in error, and of a character too important in their bearing upon the whole country to be adjudicated upon without necessity.

*THOMAS H. BAILEY v. JANE O. BAILEY ET AL. [239

A last will and testament devising lands in Ohio, if executed in a sister state, according to her laws, and probate there made, is a sufficient devise of lands in Ohio, upon its being duly recorded with the authentication of its probate in the county where the lands lie.

THIS is a suit in chancery. The case made in the bill is this: On March 9, 1828, Thomas M. Bailey, the father of the complainant, then, and up to the time of his death, residing in the county of Accomac, and State of Virginia, made his last will according to the laws of that state; the same being in his own handwriting and without witnesses. Having so made his will, he survived until January 7, 1834, when he died; and on the 27th of the same month the said will was duly admitted to probate, in the county court for said county of Accomac; and at the May term, 1835, of the common pleas of Franklin county, Ohio, a copy of said will was admitted to record by order of said court, and was duly recorded. The testator, at the time of making his will, and up to the time of his decease, was seized of land situate in the counties of Franklin, Champaign, Madison, Clark, Delaware, Fayette, Highland, Logan, Pickaway, Ross, Union, Coshocton, and Tuscarawas, in the State of Ohio, besides real and personal estate in Virginia. By his said last will, he devises 10,000 acres of his Ohio lands to the complainant, his heirs and assigns, "his choice."

The object of the bill is to enable the complainant to make his selection of the lands so devised to him.

All the defendants, being the widow, devisees, and heirs-at-law of the said testator, have answered, submitting that the prayer of the bill shall be granted, except Samuel Melvin and his wife, Elizabeth, who is one of the children and devisees of said testator, and they demur thereto.

The case was argued at great length and with much ability by EWING and STANBERRY, for the complainant, and by VINTON, for the defendants, Melvin and wife.

HITCHCOCK, J., delivered the opinion of the court:

This is a case of much importance to the parties interested; and in coming to a conclusion with respect to it we have found much

difficulty. Its decision depends upon the construction of the statute of February 18, 1831, relating to wills (29 Ohio L. 242), in which there is no little of obscurity. It was argued at the last term
240] of the court, and an opinion expressed. Upon *the solicitation of counsel a rehearing was ordered, and we have again given it a careful examination.

It is a principle which can not be controverted, that the transfer of land, whether by deed or by last will and testament, must be regulated by the laws of the country where those lands are situated. With respect to personal property the rule is different. So far as it respects conveyance of lands by deed there can be no misunderstanding of our law upon the subject. A deed executed in this state, for the conveyance of land within the state, must be signed and sealed by the grantor, acknowledged in the presence of two witnesses, who shall attest the same, and acknowledged before a justice of the peace or some other proper officer. If executed in another state or country the same formalities may be pursued, or it may be executed in conformity with the law of the state or country where actually executed; and, in either event, it shall be available to pass the land intended to be conveyed. 29 Ohio L. 346. In effect, the law of the state or country where a foreign deed is executed, is adopted for the purpose of giving those deeds validity, as the law of this state. Such foreign laws, by our own legislative enactment, become parts of our law. Of course a deed executed in New York, without witnesses, for the conveyance of land in this state, would be available, because by the laws of that state no witnesses are necessary. But a deed executed in Connecticut, without witness, would be void as a conveyance here, because in Connecticut witnesses are necessary.

The policy of this law may, perhaps, be well doubted, as when foreign deeds are introduced in evidence it may be difficult to ascertain whether they had been in fact executed in conformity with the law of the state where executed, unless we presume it from the face of the deeds themselves. Besides, its tendency is, in some measure, to create confusion and uncertainty with respect to our land titles, a consequence which ought always to be avoided. But with the policy of the law the court has nothing to do. It was introduced at an early period, and has been found in many respects convenient, and perhaps, hitherto, but few, if any evil consequences have resulted from it.

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It is supposed, by the counsel for the complainant, that by a fair construction of our statute of wills, the intention of the legislature is manifest that the same principle shall prevail; and that wills made in any other state or country, according to the law of such state or country, shall be equally available for the transfer of land here as in the state or country where made; and whether *such be the proper construction of the statute is one of the [241 questions raised by the demurrer in this case, and the one which has been principally argued by counsel. The will, under which the complainant claims, was executed in Virginia, and by the laws of that state, where the instrument is reduced to writing by the testator himself, no witnesses are necessary. This will was reduced to writing by the testator himself, and in Virginia is available, although there are no attesting witnesses. And if the same rule is to be applied to foreign wills as to foreign deeds, then this will is good and available here.

It is proper to remark that it is not contended that in the statute of wills there is any express provision that foreign wills, executed in conformity with the laws of the state where executed, shall have the same effect in this state as if executed according to our own laws, as in the case with respect to deeds. It is only by implication that it is supposed this effect can be given to them. Nor is it even contended that any original will can be admitted to probate in this state, unless executed according to our own laws.

By the act of February 18, 1831, "relating to wills," it is provided, in section 1, "that any person having an estate in lands, tenements, or hereditaments, or any annuity, or rent charged upon or issuing out of the same, or any goods or chattels, rights, credits, and *choses* in action or in possession, and property of every description whatever, may give or devise the same to any person, by last will and testament, by him or her lawfully executed." In section 2, it is enacted "that every such last will and testament shall be in writing, and signed by the party making the same, or by some other person in his or her presence, and by his or her express direction; and shall be attested and subscribed in the presence of such party by two more credible witnesses, who saw the testator or testatrix subscribe, or heard him or her acknowledge the same." Where a will is so executed, no matter where the execution takes place, it vests in the legatee or devisee the

property bequeathed or devised. Nor is any difference made as to the species of property intended by the will to be transferred, whether it be real or personal. In either case it must be attested by two witnesses. The same law requires that the will so executed shall be proved in the manner therein prescribed, in the court of common pleas, in the proper county, and admitted to record; and after proof, a copy of the will, together with a certificate of probate, is made evidence.

242] *It is strongly urged, however, by the counsel for the complainant that the two first sections of this act are applicable only to wills executed in this state; and they insist that the same law recognizes the validity of foreign wills if executed in conformity with the law of the state where executed. The argument to sustain this position is drawn from the phraseology of section 14 of the act. This section is in the following words: "Authenticated copies of wills, proved according to the laws of any state or territory of the United States, relative to any property within this state, *may be admitted to record* by the court aforesaid, in the county where such property shall be, and such authenticated copies shall be good and valid in law, in like manner as wills made in this state are declared to be." 29 Ohio L. 245.

I admit that there is some difficulty in giving to this section, taken in connection with the other parts of the act, a construction which is entirely satisfactory. But it seems to me clearly that it was not the intention to adopt the laws of other states and territories as the law of this state, so far as respects wills made in those states or territories disposing of property in this state; and, I apprehend, that no one would have come to this conclusion but for the provision already referred to in the act regulating the manner of executing deeds, etc. If such were the law, then, the original will itself might be produced, approved, and admitted to record, in the court of common pleas, upon proof that it was executed according to the law of the state or territory where executed. Otherwise we fall into the absurdity that a certified copy of an instrument is more valid than the instrument itself; that an instrument, void in its face for the purposes for which it was intended, becomes valid and effectual for those purposes by being first recorded in the state where executed.

Suppose the will of Thomas M. Bailey had been produced in the court of common pleas of Franklin county, and at the same time

the law of Virginia showing that in that state a will without witnesses was good and valid; if reduced to writing by the testator himself, would that court have admitted it to probate? I think there can be but one answer to this question, and that in the negative. The law under which that court, and every other in Ohio, acts, says: "That *every* such last will and testament shall be in writing, and shall be attested and subscribed in the presence of such party" (the party making the will) "by two or more credible witnesses;" and further declares that the will shall be proved in court by the same witnesses, unless under *peculiar circum- [243 stances. This provision is general, and contains no other restriction than that the property devised or bequeathed shall be in the State of Ohio. An instrument of writing, then, although intended as a will, can not operate as such unless attested by two subscribing witnesses.

Reference has been had, in argument, to the statute of wills of January 5, 1805. 1 Chase's Stat. 492. Section 2, of this act, provides, "that all wills and codicils (other than such as are annulled, or revoked), legally executed and proven out of this state, whether in the United States or elsewhere, being transferred here, and accompanied with the certificate of the proper officer or officers, that said will, or codicil, was executed and proved agreeably to the laws and usages in that state, or country, in which the same was executed and proved, and duly authenticated, *shall be recorded* as aforesaid, and be good and availiable in law, in like manner as wills in this state are declared to be." There could be no doubt, that the intention of this provision of law, was to place foreign wills, executed in conformity with foreign laws, upon the same footing with domestic wills executed within the state. In truth, section 1 of the act, which prescribes the manner in which wills shall be executed, seems to be confined to wills executed in the state. It provides, "that wills and codicils, in writing, *within this state*, by which any lands, tenements, hereditaments, goods or chattels, are devised," etc., shall be executed in the manner in that section prescribed. Section 2 then, provides for foreign wills, in the language already quoted. These wills, if "*executed and proved* agreeably to the laws and usages of that state, or country, in which the same were executed and proved," are declared "to be good and available in law, in like manner as wills in this state are declared to be." The evidence that they are thus "*executed*

and proved," is to be contained in a "certificate of the proper officer or officers."

This act, however, was repealed by another upon the same subject, passed February 18, 1808; 1 Chase's Stat. 571, and in this latter act, the clause giving effect to wills, "*executed and proved*" according to the laws of states where such wills are executed, is omitted, and a section introduced substantially the same with section 14 of our present statute of wills. In truth, the act of February 18, 1808, and our present statute, are substantially the same as to the formality with which wills shall be executed, and as to the mode of proof.

244] *Section 14 of the act of February 18, 1831, has already been quoted, but I repeat the quotation, "authenticated copies of wills, proved according to the laws of any state or territory within the United States, relative to any property within this state, *may be admitted* to record by the court aforesaid, in the county where such property shall be, and such authenticated copies shall be good and valid in law, in like manner as wills made in this state are declared to be." It is the last clause of the section which is relied upon by the counsel for the complainant, as favoring the construction they contend for; but, it seems to me, that full effect can be given to this clause without adopting that construction. But in order to arrive at the true meaning of this section, it is necessary to look at it in the connection in which it stands. The two first sections of the act, pointing out the description of property which may be bequeathed or devised, and the manner in which it may be done, have been already quoted. Next follows several sections, to which it is not necessary to refer, and then the manner of probate is pointed out. Section 8 provides, that after probate, a copy certified in the manner prescribed, "shall be as effectual, in all cases, as the original will would be if produced and proven." Proof having been once made before a judicial tribunal, so long as the order of approval made by that tribunal remains in force, it shall not be necessary again to make proof.

Section 13 enacts, "that if the real estate so devised, as aforesaid, be in several counties, then such will shall be proved in manner aforesaid, in one of such counties, and a certificate of such probate shall be indorsed upon it, with the seal of the court thereunto affixed; which will, with such certificate, *shall be admittd eo*

record in every county in which such lands are situated, and shall have the same validity therein, as if probate had been had thereof in each of such counties." This section, although it requires for the security of all interested, that wills shall be recorded in each and every county where there is property to be effected by them, still proof is dispensed with, except in one of those counties. Then follows section 14. Now what was the leading motive for the adoption of this section? Undoubtedly the same that induced the adoption of the 8th and 13th. The instrument having been once proved before a competent tribunal, although foreign, such faith and credit shall be given to the acts of that tribunal, that its certificate of authentication may be held as equivalent to proof by witnesses before the proper *tribunal in this state. But is the nature of the instrument [245 changed? "Authenticated copies of wills." What is a will? In Ohio, it is an instrument "in writing, signed by the party making the same, or by some other person in his or her presence, and by his or her express direction, attested and subscribed by two or more credible witnesses," and by which the party executing the same, makes a disposition of his or her property, to take effect after his or her death; and in the whole statute is no other will spoken of, except such as are nuncupative, unless it be in this section. "Authenticated copies of wills" so executed, "may be admitted to record" without producing the original itself, or the attesting witnesses; and when admitted to record, such copies "shall be good and valid in law, in like manner as wills made in this state are declared to be." But it by no means follows that an authenticated copy of an instrument, signed by the party, but not attested by witnesses, "may be admitted to record" in this state, because such an instrument is a will where "executed and proved." Under the act of 1805, a will "executed and proved" according to the laws of the state or country where executed, would be equally available with a will executed according to the laws of this state. But under the law of 1831, it is otherwise; and, in the opinion of the court, the copy of Bailey's will was improperly admitted to record; because, although the instrument might be, and in fact was, a will in Virginia, it is not a will in Ohio.

It remains to inquire into the effect of admitting the copy to record. I apprehend there can be but one opinion upon this point. The effect is the same as if the instrument itself had been origi-

nally introduced in the court of common pleas of Franklin county, there proved and admitted to record. What, then, is the effect given to the probate of a will by the statute of Ohio?

A full consideration of our several statutes upon the subject of wills, enacted at different periods since the organization of the state government, has led this court to the conclusion that no person can effectually claim title under a will, until the same shall first have been proved and admitted to record. It has been so decided at the present term of the court, in the case of the Lessee of Swazey's Heirs *v.* Blackman. The same principle was held with respect to foreign wills, in the case Willson's Executors and Abraham *v.* Benjamin Tappan; 6 Ohio, 172. And this may be considered as a settled rule of law.

246] *It being supposed, however, that wills might, in some instances, be improperly or unadvisedly approved and admitted to record, provision has been made for the manner in which, after having been admitted to record, they may be contested. The principle was first introduced in the act of February 18, 1808, "for the proving and recording of wills and codicils," section 9 of which act is as follows: "That if any person interested, shall within two years afterward," that is, two years after probate, "appear, and by his bill in chancery, contest the validity of the will, an issue shall be made up whether the writing produced, be the will of the testator or not, which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court the power of granting a new trial for good cause, as in other trials, but if no person appear in that time, *the probate shall be forever binding*, saving also to infants, married women, and persons absent from the state, or of insane mind, or in captivity, the like period after the removing of their respective disabilities." 1 Chase's Stat. 571. The same provision, in the identical words, has been continued in all the subsequent statutes upon the same subject, down to the present period, with this addition, that the right of appeal has since been given to either party feeling aggrieved by the decision upon the contest, and is contained in sections 20 and 22 of the act now in force. 29 Ohio L. 246. As the law is settled, that a will is not available to pass property until proved; and as the legislature have declared that "*the probate shall remain forever binding*," unless contested in the manner prescribed, it would seem to follow that so long as the probate remains unimpeached, any instrument re-

corded by order of the probate court, purporting to be a will, must be held to be available for the purposes intended to be effected by such instrument. And such we believe to be the proper construction to be put upon our local legislation upon the subject. This principle which is fairly deducible from our statute, is believed to be one which will be found beneficial in its results, as it will save controversies respecting wills, after the same shall have been many years proved and recorded. It will, in fact, tend to the security of titles held by devise, and can rarely, if ever, operate any essential injury.

Melvin and wife do not, in pursuance of the statute, contest the validity of the will under which the complainant claims. This they may do, if they can bring themselves within the saving *clause of the statute, and upon such contest the question [247 will arise, which has been so fully and ably argued by counsel, whether a will executed in a foreign state, according to the laws of that state, but not in conformity with the laws of this, is available for the transfer of property in this state. They are now attempting to impeach the validity of this will, the probate remaining in full force. They are attempting to do that indirectly, which the statute provides shall be done directly. In the opinion of the court, this can not be done consistently with the law under which we act, and by which our decision must be governed. There can be no more propriety in sustaining their defense in this case, than there would be if it was based upon the ground that the testator was of unsound mind and memory.

It may be said, however, that inasmuch as the fact appears upon the face of the bill of complaint, that this will was not executed in conformity with our law, therefore, the court may with propriety treat it as no will. Such in the first instance was the opinion of the court. But upon further reflection we have arrived at a different conclusion. The act of approval and ordering to record, by the court of common pleas, is a judicial act. And as the legislature have declared the effect of that act, unless the same shall be impeached within a specified time, and in the prescribed form, we entertain the opinion that it can not be impeached after that time, nor in any other form. A deed informally executed, can not operate as a conveyance, although recorded. The recording is not necessary to the validity of a deed, and it is a mere ministerial act. But the probate of a will is necessary to give it full effect

It is a judicial proceeding, and must be set aside in the manner provided. Unless so set aside, it "shall be *forever binding.*"

The demurrer is overruled, and the complainant may take a decree.

248] *EBENEZER MATOON *v.* THE HEIRS AND ADMINISTRATORS OF AMASA CLAPP, DECEASED, ET AL., AND COLE & FIELD.

In a bill in chancery to subject an equitable interest in lands to the payment of a debt due from a security in a bond, a judgment at law in favor of the obligee against such surety, is prima facie evidence that the bond was made and the condition broken.

The admission of an administrator is prima evidence of the indebtedness of the estate he represents, in any particular case of admission.

A judgment in favor of an administrator defendant, in a court of the State of Massachusetts, upon a plea of the statute of limitations of that state, is no bar to a bill in equity in Ohio, between the same parties, seeking to subject after discovered property of the decedent to the payment of the debt.

A decree to marshal descended lands for the payment of debts, can only be made where the demand of such marshaling is made in the pleadings, so as to present a case for proof at the hearing.

THIS IS a bill in chancery reserved in the county of Geauga.

The following facts appear upon the bill, answers, and testimony.

In 1799, the plaintiff was the sheriff of the county of Hampshire, in the State of Massachusetts. He appointed Thomas Kidd a deputy, who gave him a bond of indemnity, with Amasa Clapp and Charles Kidd his sureties. Clapp died in 1804, and the administration of his estate was committed to Solomon Clapp and A. Rice. Kidd having failed to pay over moneys collected, a suit was instituted, in 1807, against the surviving obligors of the bond, and a judgment for the penalty was rendered by the supreme judicial court of Massachusetts, in 1810, with leave to take out execution for the sum of $1,528.48. In 1815, no satisfaction having been obtained upon this judgment, and the defendants to it being insolvent, proceedings, conformably with the law of Massachusetts, were instituted against the administrators of Amasa Clapp, for their liability upon the bond. The defendants pleaded

the Massachusetts statute of limitations. This suit was referred to arbitrators to decide, who found in their award that the claim was barred by the statute of limitations; upon this report, judgment was entered for the defendants.

By the statute of limitations of Massachusetts, no claim can be enforced against an administrator, unless it shall be presented within four years from the date of administration, except only where the creditor has failed to present his claim, and shall subsequently find property unadministered upon. The plaintiff avers, that he was ignorant of Kidd's delinquency until 1807, and he then supposed the surviving obligors of the bond able to respond the amount, and that he pursued the claim against Clapp's estate, as soon as he found he could not otherwise obtain payment.

When Amasa Clapp died, he held an equitable title to about 1,000 acres of land in the county of Geauga. This interest is not noticed by the administrators, in their administration account, although the estate is shown to be insolvent. In 1805, Lord, the trustee of the legal title, conveyed this land, together with sundry other tracts of land in Portage and Medina counties, to Salma *Clapp and Alvin Rice, the administrators of Amasa Clapp, [249 in trust for the benefit of the estate of Amasa Clapp. This deed was not recorded until 1810. The plaintiff avers, that he was ignorant of this property until 1822; that he proceeded as early as convenient to assert his claim; he procured the appointment of U. Seely, an administrator *de bonis non*, etc., in 1827, to whom the claim was presented and allowed. The defendants, Cole and Field, have purchased the land, and this bill is brought against all parties in interest, seeking satisfaction of the balance of the judgment, by a sale.

This suit was instituted in 1829. In December, 1835, it was heard before this court, in bank, on a general demurrer, but by accident, was not reported. It stands now for hearing, upon the answer of Cole, which demands proof of the existence of the debt, denies that the admissions of Seely (who has been removed from his administratorship), are binding upon him, and asserts that he purchased for an adequate consideration, without any "certain knowledge" of the bond, or "any certain information," that Kidd was a deputy, etc., or that "he had, at the time of his purchase, or that he has yet obtained any knowledge that com-

plainant had, or now has, any claim against the estate of said Clapp."

R. HITCHCOCK and WEBB, for the complainant.

J. H. PAINE, J. C. and B. T. WRIGHT, for defendants.

Judge LANE delivered the opinion of the court:

The pursuit of the plaintiff's rights in equity is admissible, as well because he seeks to subject to the payment of debts, the estate of a deceased obligor, as because that debtor had only an equitable title to land, which can not be brought to a suit sale except under a decree. 6 Ohio, 233.

The liability of Amasa Clapp's estate must be shown by satisfactory proof. The record from Massachusetts is *prima facie* evidence that the bond was made by Thomas and Charles Kidd, and that its condition was broken by Thomas Kidd, by which the plaintiff was damnified, to the extent of the judgment. 3 Ohio, 487, 225; 2 Ib. 355; 4 Ib. 104. The admissions of Seely, the administrator, are *prima facie* evidence of the liability of the estate of A. Clapp; he is a necessary party to such a suit, 5 Ohio, 250] 555, for *the purpose of admitting or contesting the debt, and representing the interests of the estate. His acts are not conclusive; but creditors are not required to go behind them, unless fraud or mistake is shown them.

The point most strenuously insisted upon is, that the judgment in Massachusetts, in 1815, forms a bar to all further proceedings. This defense does not consist in the statute of limitations, as applicable to this action; nor in the antiquity of the claim, which under some circumstances furnishes evidence of payment; but in the position that a judgment has been rendered, upon the merits in a suit between these parties, which concludes their rights. Whether a judgment on a plea of the statute of limitations is a judgment on the merits, and binding on the parties, beyond the territorial operation of the statute, is a question which is not discussed, nor will it be now decided; it is intended at present, to give to the judgment the same effect it would produce in Massachusetts. Adverting to the statutes of that state, as furnishing the law of the case, we find administrators well protected from suits, on claims not presented within four years, except upon one contingency, viz., the discovery of other property, which had not then happened. The statute of limitations being a complete bar,

not to the right, but to the remedy, in the state of things then existing, judgment was rightly given for the defendants. But had unadministered property been afterward found in Massachusetts, new relations would have intervened between the parties, under the exception, removing the restriction and conferring, as it were, a new right of action. The record shows, that by the adjudication of that tribunal, no right of action then subsisted; whether the right has been restored, by the occurrence of other facts since that judgment, is a question which has never been submitted to a court. We think, then, that this former judgment would have been no bar to this claim, in the State of Massachusetts, if the property not administered upon had been found there, and it will possess no higher force in our tribunals.

The defendant, Cole, insists that the land yet remaining in the hands of the heirs shall be first held for this debt. The right is well established, in a proper case. 6 Ohio, 238. But this privilege of marshaling descended lands is a distinct and affirmative claim, to be brought forward by the defendant, and plainly established by proof. This point is not made in the answer, but is suggested in argument only. Although other lands are referred to in *the bill, it nowhere appears what lands, of what value, [251 or whether unsold. It would be hardly proper to postpone the plaintiff further, unless the right to impose the burden elsewhere were more clearly shown.

The defendants, Cole and Fields, claim to be purchasers, for a valuable consideration, without notice. Without adverting to the very guarded terms, in which notice is denied, or the want of averment of the payment of the full consideration, and without examining the proof, which seems to show express notice, it appears to us that the terms of the deed, from Lord, to the administrators, through which they must trace their title, are enough to charge them. 4 Ohio, 458.

Decree for plaintiff.

CASES

DECIDED BY THE

Supreme Court of Ohio,

IN BANK,

AT DECEMBER TERM, 1838.

PRESENT:

EBENEZER LANE,
REUBEN WOOD,
PETER HITCHCOCK,
FREDERICK GRIMKE,
} JUDGES.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF CHILLICOTHE *v.* NOAH H. SWAYNE AND WM. MINER, IMPLEADED WITH HIRAM PADDLEFORD AND LYNE STARLING.

Plea, that a bill of exchange was drawn and discounted for a loan made at a greater rate of interest than six per cent., and, for that reason, void. Replication does not traverse the plea, nor allege matters in avoidance, but asserts that the bill was drawn upon a good and valid consideration, and not upon a usurious agreement; and also that the plaintiffs purchased the bill for a good and valuable consideration, with a conclusion to the country. Replication bad, as multifarious, and as concluding to the country.

Bank of Chillicothe *v.* Swayne et al.

Where a bank charter declares that it shall not take more than six per cent upon its loans, a contract for a greater rate of interest is totally void.

THIS is an action of assumpsit reserved in the county of Franklin. The declaration contains four counts.

The two first counts are upon a bill of exchange, drawn by the defendants on one Flewelling, residing in the city of New York, for $5,000, payable six months after date, at the National Bank in New York, dated March 14, 1837, and protested for non-payment.

The other two counts are the common counts for money had and received, etc.

To this declaration the defendants filed five special pleas in bar, the first of which is in substance as follows, to wit: It is alleged, "that the said Hiram Paddleford, on March 3, 1837, being in want of money, made application to the plaintiffs to borrow of them $5,000, upon a note proposed to be executed by the said Hiram Paddleford, Lyne Starling, Noah H. Swayne, and William Miner, which application was taken into *consideration by the plaint- [258
iffs, and afterward, to wit, on the 6th day of March aforesaid, the said plaintiffs, in reply to the said application, gave the said Hiram Paddleford to understand and be informed, that the plaintiffs were not discounting notes, at the then present time, but that money might be obtained from the plaintiffs upon a bill on New York, Philadelphia, or Baltimore, payable six months after date, and drawn by the said Paddleford, Starling, Swayne, and Miner; that thereupon and in pursuance of said suggestion of the said plaintiffs, the said bill in the declaration was signed for the purpose of being presented to the said plaintiffs to be by them discounted, and thereupon afterward, to wit, on said March 14, 1837, the said Hiram Paddleford presented the said bill so signed as aforesaid to the said plaintiffs, to be by them discounted, and thereupon, to wit, on the day and year last aforesaid, at Chillicothe, to wit, at the county aforesaid, it was unlawfully, usuriously, and corruptly agreed by and between the said Hiram Paddleford and the said plaintiffs, that the said plaintiffs should then and there discount the said bill for more than six per cent. per annum, to wit, that the said plaintiffs should then and there discount the said bill and advance the said Hiram Paddleford thereupon the sum of $4,725.78 and no more; and the said Noah H. Swayne and William Miner

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aver, that in pursuance of said usurious, corrupt, and unlawful agreement, the said plaintiffs did, afterward, on the day and year last aforesaid, at Chillicothe, to wit, at the county aforesaid, discount the said bill for more than at the rate of six per cent. per annum, to wit, the said plaintiffs did then and there discount the said bill, and advance to the said Hiram Paddleford thereupon the sum of $4,725.78 and no more, and thereupon the said Hiram Paddleford did then and there deliver to the said plaintiffs, and the said plaintiffs did receive and now hold, the said bill for the full amount of the said $5,000 specified therein, they, the said plaintiffs, upon the discounting the same as aforesaid, having advanced therefor, as the whole and sole consideration therefor, the said sum of $4,725.78 and no more. And the said Noah H. Swayne and William Miner further aver, that all the said several sums of money in the said several counts of the said declaration mentioned, are the same sums of money contained and specified in said bill of exchange in the said declaration mentioned and declared upon, and not other or different; and the said bills of exchange in the said declaration mentioned, are one and the same bill of exchange and not other or
259] different. *And the said Noah H. Swayne and William Miner further aver, that the discounting of said bill of exchange in manner aforesaid, was and is in violation of the laws of the land and of the articles of the plaintiffs' corporation, and that the said bill in the hands of the said plaintiffs is fraudulent and void in law, and this they are ready to verify," etc.

The second plea is like the first with only this difference, the sum alleged to have been received by Paddleford on the discount of the bill is stated at $4,796.67, instead of $4,725.78, as in the first plea.

The defense set up in the third, fourth, and fifth pleas is substantially the same as in the first and second, although the facts are somewhat differently set forth.

In reply, the plaintiffs say, they ought not to be barred because they say "that the said bill of exchange in the said declaration mentioned was drawn by the said Hiram Paddleford, etc., for a good and legal consideration, and not in pursuance of, or upon the said unlawful, corrupt, and usurious agreement, or for the purpose in the said plea of the said Noah H. Swayne and William Miner, mentioned in manner and form as the said Noah H. Swayne and William Miner have in their said first plea alleged, and the

said president, directors, and company in fact say, that they *purchased* the said bill of exchange from the said drawers for a good and valuable consideration, to wit, for the sum of $4,725.78, and this the said president, directors, and company pray may be inquired of by the country," etc.

A similar replication was filed to the second, third, fourth, and fifth pleas, and an additional replication to the five several pleas, precisely the same in form and substance as the replication to each plea separately.

To these replications the defendants demur specially, assigning the following causes, to wit:

To the first five replications.

1. "Each of said replications attempts to put in issue several and distinct matters, thereby tending to produce a multiplicity of suits upon the record."

2. "Each of said replications tenders an immaterial issue."

3. "Each of said replications is multifarious, and presents a variety of points, but not one single point on which issue can be joined."

4. "Each of said replications introduces new matter, and, therefore, ought to conclude with a verification."

*5. "Neither of said replications set forth the time or [260 place of the purchase of said bill, and for aught that appears, the purchase may have been made since the filing of the plea."

6. "Neither of said replications deny, or confess and avoid the plea which it assumes to answer."

7. "Each of said replications contains contradictory matter."

To the sixth replication:

1. "It tenders an immaterial issue."

2. "It ought to conclude with a verification."

To all the replications:

1. "The plaintiffs have put in two replications to each plea containing distinct matters."

2. "Other causes."

P. B. WILCOX, for defendants, insisted:

I. The principle which lies at the foundation of the defense is this:

That a contract made by a corporation about any matter prohibited, and made unlawful, by *its own charter*, is a void contract.

The modern doctrine is, to consider corporations as having such

powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine in 1804, and it has been repeated in the decisions of the state court. No rule of law comes with a more seasonable application, considering how lavishly charter privileges have been granted. As corporations are the mere creatures of the law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner, and subject matter prescribed. 2 Kent's Com. 239.

To prevent monopolies, and to confine the action of these powerful bodies strictly within their proper sphere, the acts incorporating companies, passed in this country, almost invariably limit the amount of property they shall hold, or their capital stock, and frequently prescribe in what it shall consist, the purposes for which it shall alone be purchased and held, and the mode in which it shall be applied to effect those purposes. There can be no doubt, that if a corporation be forbidden by its charter to *purchase* or *take* lands, a deed made to it would be void, as its capacity

261] *must be determined from the instrument which gives it existence. Ang. & Ames, 80; 7 Serg. & Rawle, 319.

All privileged associations should be watched with argus eyes. They should be regarded with distrust. It is the duty of courts to keep them within the bounds prescribed by the legislature. They are opposed to the genius of our government, and, if tolerated, should not be permitted to abuse the privileges with which they are intrusted. These considerations apply with peculiar force to incorporated banks. Drawing around them, as they evidently do, a silent, yet powerful influence in the neighborhood where they are situated, they will ever be watched with jealousy by a people alive to their rights and liberties. Banks being granted for the express purpose of loaning money, the rule of construction of the statute of usury will not be softened in their favor. If the principle contended for by the opposite counsel be correct, what salutory statute can hereafter stand against the usages of trade? What law can hereafter be enacted, which may

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not be trodden down by the custom of the banks? Griffin, *arguendo*, 2 Cowen, 755.

A corporation not established for trading purposes, can not be acceptors of a bill of exchange, payable at a less period than six months from the date, because such a case falls within the provision of the several acts passed for the protection of the Bank of England, by which it is enacted; that it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof. Judge Best held the acceptance void for want of capacity in the corporation to make a contract implicitly prohibited by its charter. 3 B. & A. 1; 5 Eng. Com. Law. 215.

So where the Hudson Insurance Company took a note for $15,000, a *part* of the consideration of which was not authorized by their charter, no action could be sustained on it by the company; and being void *in part*, was void *in toto*. 1 Hall, N. Y. 480.

So where the New York Firemen's Insurance Company discounted a note contrary to the express prohibition of their charter, it was held that the company could sustain no action upon the note. They had neither the right, nor the capacity, to make such a contract. 5 Conn. 560.

The Branch Bank of the United States at Lexington, Kentucky, discounted a promissory note, reserving interest thereon, at the *rate of six per centum per annum; it being agreed that the [262 owner of the note should receive the proceeds of the discount in notes of the Bank of Kentucky, at their nominal value, although the same were, at the time, of no greater current value than fifty-four per cent. of the said nominal value. Held, that the contract was void, and that the bank could not recover of any of the parties to the discounted note. The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved to be void. Yet such a contract is void upon general principles. Courts of justice are instituted to carry into effect the laws of a country, and they can not become auxilliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. Bank of the United States v. Owens et al, 2 Pet. 527.

The case last cited is identical with that before the court, and furnishes precedents to the first two pleas. It is also adopted as sound law by the Supreme Court of New York. 7 Wend. 276.

II. The contract declared upon, being prohibited by the general statute regulating interest, is a void contract.

At common law, the reservation of *any* interest avoided the contract. 2 Roll, 469; 5 Law Lib. 63

By statute 37, Hen. 8, A. D. 1546, the common law was altered, and ten per cent. interest allowed. The penalty was a forfeiture of treble value, one-half to the informer, and one-half to the king, with imprisonment of the body.

By 5 and 6 Ed. 6, A. D. 1553, the statute 37 Hen. 8, was repealed, and *all* interest declared illegal, as at common law.

By 13 Eliz., A. D. 1571, the statute 5 and 6 Ed. 6, was repealed, and the 37 Hen. 8, re-enacted.

By 21 Jac. 1, A. D. 1624, the rate of interest was reduced to eight per cent.

By 12 Car. 2, A. D. 1672, the rate of interest was reduced to six per cent.

By 12 Anne, A. D. 1714, the rate of interest was reduced to five per cent.

The last statute is now in force in England.

The statute of 37 Hen. 8 was adopted and in force in Ohio from 1795 to 1799. 1 Chase's Stat. 484. It is therefore important to understand the construction put upon it by courts of justice in England.

263] *The statute does not, *in terms*, declare a usurious contract void, yet the courts hold this language: "Every contract assurance or security, which is founded in usury, is *ipso facto* void, and is extinct at its very inception." 4 Leon. 43; 3 Leon. 205; 1 Mod. 69; Moore, 397; Shep. Touch. 63.

The contract was held void because made against the express *prohibition* in the statute, and not because the statute contained a *penalty*. The design of the penalty was to punish the usurer when the contract was actually *executed*, and the usury actually received. Where the contract was *executory*, it was held void as being made against the *prohibition* of the statute. 1 Mod. 69; Cowp. 114.

So, where a judgment is entered on a warrant of attorney, including unlawful interest, the court, upon proper affidavits, with-

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out payment of the money actually borrowed, and the lawful interest, order the judgment to be vacated, and if the jury, upon an issue, find the warrant of attorney usurious, the court order it to be delivered up and canceled. Such, says Judge Bayley, has always been the practice of the king's bench. A different practice, to some extent, prevailed in the common pleas. 6 Eng. Com. Law, 357.

So, chancery will furnish no aid to him who contracts to *receive* unlawful interest; but when he who contracts to *give* unlawful interest applies to equity for relief, he is required to pay the money actually borrowed, and the lawful interest, for it is against conscience for him to retain it. The policy of this rule has, however, been doubted by Chancellor Kent. 5 Johns. Ch. 138.

The statutes of Ohio relating to interest are these:

1. Statute of 37 Hen. 8, fixing the rate of interest at ten per cent., and annexing a penalty. 1 Chase's Stat. 484, adopted 1795.

2. Act of 1799, repealing 37 Hen. 8, and fixing the rate of interest at 6 per cent. No penalty, but permitting the defendant to plead the usury specially, and, if found in his favor, the plaintiff could recover the amount actually loaned, *but without any interest.* 1 Chase's Stat. 484.

3. Act of 1804, repealing the act of 1799, and, in substance, re-enacting the statute of 37 Hen. 8. In this act, the second section of the act of 1799 was dropped, and in its place the prohibitous words "no more" introduced into the first section.

4. Act of 1824, dropping the penalty in the act of 1804.

It would seem, therefore, that the statute of 37 Hen. 8, saving only the penalty, is in substance the law of Ohio at this *day. It contains an express prohibition against receiving [264 more than six per cent. interest and therefore a contract made against such prohibition is void.

A contract may be void as against a statute in three ways

1. By declaring it void in *express terms.*

2. By annexing a penalty, which is an *implied* prohibition

3. By a simple prohibition.

Cases to this point are the following: 17 Mass. 258; 1 Maule & Sel. 597; 5 Eng. Com. Law, 215; 1 Bos. & Pul. 265; 2 Pet. 539.

Where the bills of certain foreign banks were probibited under a penalty to be received, or in any way negotiated by

the banks within the commonwealth of Massachusetts, it was held that a note payable in such bills to a banking corporation was void, and that no action could be maintained upon it. 14 Mass. 322.

Where a bank discounts a note at the usual rate of interest, upon condition that the person offering the note for discount shall receive post-notes payable at forty-five, sixty, and ninety days, as cash, and the post-notes are paid and received as cash for the note they discounted, the note discounted is usurious and void. 2 Hals. 130.

To take interest in advance upon discounting a ninety-day note, calculated according to Rowlett's tables, is usurious, and the note void. 2 Cow. 712.

No action brought by an unchartered bank, on a bond given for bank-notes emitted by the said bank, can be sustained. 1 Rand. 76.

A contract void in part, as against a statute, is void *in toto*. 1 Eng. Com. Law, 263; 1 Hall, 546; 2 Pet. 527.

III. But admitting the general statute regulating interest to be no bar to the action, still the question is open as to the validity of a contract made by a corporation in violation of its own charter.

It may be conceded that in all cases *out* of their charters, corporations are to be governed by general statutes, in the same manner as individuals. But as to all matters *within* their charters, there springs up a new set of rights and liabilities, which are to be governed and adjudged upon by the law of corporations.

A corporation has no powers except those expressly or impliedly granted by their charter. The charter of the Bank of Chillicothe expressly *withholds* the power to make the contract
265] *set out in the record. It is therefore void *in toto*. 1 Hall, 480; 5 Conn. 558.

Four things are prohibited to the plaintiffs by their charter:

1. They shall not deal in real estate except for their convenience.

2. They shall not deal in merchandise except for their convenience.

3. They shall not *discount* bills or notes except at six per cent.

4. They shall not *loan money* except at six per cent.

Now if the plaintiffs, in purchasing a site for their banking

house, had embraced in their contracts other lands for the purposes of speculation, it can hardly be insisted but such a contract would be void *in toto*.

Or, if the plaintiffs, in purchasing furniture for their banking house, had embraced in their contract other furniture for the purpose of supplying the town of Chillicothe, such a contract could hardly be supposed valid.

So, here, the plaintiffs admit that the contract set out in the record embraces more interest than their charter allows; the contract therefore is void. 5 Conn. 560.

HENRY STANBERY, for the plaintiffs:

On March 14, 1837, the plaintiffs purchased a bill of exchange, made by the defendants on S. Flewelling, Esq., New York, at six months' date, and dated on said March 14, 1837, payable at the National Bank of the city of New York, to the order of plaintiffs, for $5,000.

The plaintiffs paid the defendants the proceeds of this bill, less the discount, and *one per cent.* in addition thereto, which was retained *for exchange.*

Is this transaction contrary to the charter of plaintiffs? If so, is it wholly void?

Section 20 of the charter is in these words: "That the said corporation shall not take more than at the rate of six per centum per annum on its loans or discounts." 3 Chase's Stat. 2029.

No penalty is given for a violation of this section, nor for a violation of any other provision of the charter.

There is no clause expressly authorizing the bank to purchase notes or bills of exchange, nor is there in any of our bank charters *which I have examined; but there is in section 15 a special [266 inhibition against dealing or trading in goods, wares, merchandise, or any commodities whatever. The dealing in exchange being a legitimate business of banking, and the special prohibition not extending to it, that right is conferred by the charter.

The first inquiry, then, is, whether this transaction is a loan or discount, or the purchase of a bill of exchange?

The instrument is, in form, a bill. It has a drawer, a payee, a drawee, time, place, and sum to be paid; is for money, and subject to no contingency; it is therefore a bill of exchange. The operation on this paper is quite a different thing from what is understood by a loan or discount merely. A loan or discount (and

the terms seem to be used synonymous) implies the undertaking of the borrower to repay the lender. His is the duty of paying, and the place of payment is ordinarily the residence of the borrower; or in bank loans, the banking house. But in this transaction the person who receives the money is not the one who is to pay. The bank can not look to him except upon the default of the drawee, and the *place of payment* is at a distant point, to which the bank must convey the bill, and there receive payment. There is, then, a marked difference between a mere loan or discount and the purchase of a bill.

Inasmuch as banks are allowed to deal in exchange; in other words, to purchase and sell exchange, can there be a doubt that they may purchase or sell on such terms as they find convenient or advisable? If a bank has a sum of money at a distant point, may it not sell its draft or bill for that money at any rate of premium or discount which it can obtain? No one will question this, even if the rate of premium should exceed six per cent. If an individual have a sum of money, or expects to have, at a distant point, may a bank not purchase his draft or bill at any rate which can be agreed upon between them? Nothing can be clearer than the right to make such purchase. If the bill purchased is what is called a sight bill, and a premium is charged by the bank for cashing it, this premium would then be a compensation to the bank for collecting the bill and taking its money at a distant place; or if the bill purchased by the bank was on time, there would be a charge for interest on the money to the maturity of the bill, and a charge for premium of exchange in addition. If, in that operation, the bank should take *specifically* for the interest at a greater rate than six per cent. per annum, it 267] *might be held a violation of its charter; but if *for interest*, it took only at the legal rate, it might charge for premium of exchange an additional sum, and at any rate. There is no prohibition against purchasing or selling exchange at any other than one rate. Obviously, such a law would be in the highest degree impolitic. The rate of interest, in a particular coummunity, may be fixed, and, without much inconvenience, remain stationary; or, in the gradual increase or decrease of money, be, at given periods, varied; but it is impossible to fix the rates or values of exchanges, depending, as they do, upon constantly changing circumstances, and fluctuating with every change. If, then, the one

per cent., beyond the discount for the time, was taken by the bank from the amount of this bill *for premium of exchange*, it is not a taking of more than six per centum per annum upon the loan or discount. If it should be said that this could not be taken for premium of exchange, because the rate of exchange was in favor of New York, and the money there, more valuable than in Ohio, the answer to that is, that it was a matter to be looked to by the parties. As no rate of exchange is prescribed by law, the contracting parties must be left to make their own bargain. It is, however, well to observe, that the Bank of Chillicothe paid their money for this bill, in March, 1837, just at the time when there was an unusual demand for specie in Ohio. Money (that is specie), here, was more valuable at that juncture than specie in New York, and almost all the banks incurred an expense of much more than one per cent., to bring specie from the east or south.

The transaction upon this bill, then, involved two operations: one in the form of a loan or discount, for the time the bill had to run, and as to that, the bank charged only at the rate of six per cent. per annum, by way of interest; the other in the form of exchange, the money being paid here, to be repaid at New York, and as to that, the bank charged one per cent. for premium. This is the form of the transaction, and a case may be imagined in which this form is adapted solely for the purpose, and with the understanding of taking a higher rate *for interest* than six per cent. For instance, if it were proved that the agreement was simply for a loan, at the rate of seven per cent. for interest, and that the form of a bill was adopted for a cover or device to evade the law, and that it were well understood and agreed between the parties, that payment was not to be made at the place where the *bill [268 expressed that payment should be made, but at the counter of the bank; that no presentment, demand, or notice, or liability for damages on non-payment was to follow, such a transaction would come within the prohibition of the statute.

Suppose such proof to be made as to this transaction, and that this were shown to be a taking of more than six per cent. per annum for interest, and to be directly within the prohibition of section 20 of the charter, what would be the effect of such proof upon the plaintiffs' case?

It has been already stated that the charter fixes no penalty for a violation of this section, nor does it declare what shall be the

consequence, either as to the contract or corporate rights. The charter was created in the year 1808; at that time there was a law in force against taking more than six per cent. per annum for interest. This was the act of 1804 (1 Chase's Stat. 384), a general law, which prohibited the taking of a higher rate of interest than six per cent. per annum, and declared the consequence of taking more to be a forfeiture of the whole amount of the debt; the one-half thereof to the county, and the other half to the informer. This being the state of the law in 1808, an usurious transaction by a bank would have fallen (in the absence of any special penalty in the charter) under the operation of this statute; and the forfeiture of the entire debt would have been the consequence. That forfeiture, however, would not have affected *the contract;* and the usurious agreement could only be set up against the recovery of the usurious interest; such has been the construction given to that law by this court. In the case of the Lafayette Society *v.* Lewis, 7 Ohio, 83, Judge Hitchcock, in delivering the opinion of the court, says:

"It will be observed, that by the law of 1804, a contract providing for a greater rate of interest than that therein prescribed, is not declared void, although a penalty is inflicted upon such as shall demand or receive a greater rate. By the construction put on that act, a contract stipulating the payment of a greater rate of interest than six per cent. was not void. Such contract might be enforced so far as to compel the payment of the principal sum and interest at the rate of six per cent, and no more."

If, then, this transaction had taken place whilst the act of 1804 was in force, we see what would have been the consequences. That act was repealed by the act of January 12, 1824, which provided, in the same language used in the act of 1804, that no more
269] *than six per cent. should be received for interest, and repealed the penalty. So far as *the contract* is concerned, our court has given the same construction to this statute, that had been given to the act of 1804, and has held that the debt and interest at the rate of six per cent. could be recovered, but no more. Lafayette Society *v.* Lewis, *ut supra.*

At the time this bill was purchased by the plaintiffs, the act of 1824 was in force, and yet continues in force. There can be no question that it applies to corporations as well as to individuals. The language is, "all creditors shall be entitled to receive," etc.

Nor can any argument against the application of this statute to banks be drawn from the fact that the prohibition is confined to receiving more than six per cent. upon *money due*. We know that banks take their interest before the money is due; they are, therefore, not within the very letter of the statute if the expression *money due* is to be understood according to the letter. But that is not its meaning. If it were, it would be, in nine cases out of ten, a dead letter; for the usurious lender would always take his per cent. in advance. The observations of Judge Hitchcock, in the case before referred to, are very applicable here. He says: "The law purports to fix the rate of interest, not for a particular class of creditor, but *for all creditors*, and it fixes the rate of interest upon *all moneys*. True, it speaks of *money due*, as did the act of 1804 and that of 1899, preceding it; but it is for this reason the collection can not be enforced until it is due, and, when collected, the interest attaches at the rate prescribed by the statute." Page 85.

Here, then, is a charter of a particular corporation which prohibits that corporation from taking more than six per cent. for interest; the prohibition is a naked one, and wholly free from any penalty or forfeiture, or other consequences declared by the special law of the charter. Here, too, is a general law applicable to this corporation, upon the same subject matter, fixing the same rate of interest, and providing that no more shall be recovered; a law which establishes the policy of the state as to usury, and which was made to take the place of a previous statute establishing a forfeiture by repealing that penalty. In this condition of special and general legislation, can it be successfully argued that the general law does not apply to a bank contract? If it does, there is an end to this case, and the bank can recover its debt and interest at the legal rate, but no more.

The case of Thornton *v.* Bank of Washington, 3 Pet. *36, [270 is directly in point upon this question. That case arose in the District of Columbia, upon an alleged usurious loan by the bank. The counsel for the bank contended that the Maryland law of usury did not apply to banks: "It was passed before the establishment of banks. The language is prohibitory as to any *person*, and this may include corporations sole, but not corporations aggregate. It is a criminal law, and a strict construction may be insisted on. The insertion, say they, of a prohibition against taking more than six per cent., in the charters of banks, is a proof that

the general terms of the usury laws are not considered as extending to such corporations. It would not be necessary, if this were the sound construction of the usury laws." Page 39.

These are the arguments of Mr. Lear and Mr. Webster for the bank, and it is worthy of observation, in passing, that those learned counsel did not apprehend any difficulty from the charter prohibition, or imagine that the contract was void on that account. Judge Story, in delivering the opinion of the court, disposes of this distinction in a very few words. His language is as follows: "Upon the other point suggested in the cause, whether banks are within the statute of usury, we entertain no doubt that they are." Page 42.

The argument might safely rest here, but I propose now to consider this case as if the general law upon the subject of usurious contracts did not apply to the plaintiffs. The question then arises upon the naked prohibition of the charter. What consequences upon the contract will the court deduce from that prohibition?

It is argued for the defendants, that this taking of the higher rate of interest makes the entire contract void, on the ground that such taking is prohibited by law. I admit the general rule, that contracts forbidden by law or against the policy of the law are void; great care is necessary in the application of that general principle, and it seems to me it does not apply to this case.

The prohibition, in this case, is not declared in any general law, but in a special act of incorporation. It is not against or in contravention of any statute settling the public policy in the subject matter. The thing done is not *illegal* in the sense of that term which avoids the entire contract in which it enters as an integral part. It is not immoral in any sense of the term; for 271] *according to the modern opinion, and especially to our legislation on the subject of usury, the taking of more than six per cent. for the loan of money is not prohibited; all that the law declares is that the excess shall not be recovered.

In the English and many of the American statutes against usury, it is not merely prohibited, but the contract, tainted with usury, is declared wholly void. The policy of these laws has been often and well questioned, but there can be no question in their construction. The entire contract, the good with the bad, is made void. If, then, the taking of more than six per cent. by the plaintiffs is in any sense against law, it is only *the taking of the*

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excess. That is the only thing prohibited. The loan of the money, the right to the legal interest, the capacity to sue, are all expressly given to the plaintiffs. All that is said, is that they shall not take interest beyond a certain rate. The only void thing in this transaction is the alleged taking of the one per cent. above the six per cent., and that is void, because no remedy is given for its recovery. The court will not lend its aid to recover it, because it will not assist parties to recover what the law has forbidden. Every principle of justice demands that all the residue of the contract should be enforced. Both parties were consenting to the extra interest; no fraud or imposition was practiced. Why, then, should the borrower in this case be allowed to set up this defense not merely to protect himself against the payment of the excess, but also against the repayment of the money which he has received, and of which he has had the benefit? In the worst cases of fraud, deceit, and imposition, the guilty party is still allowed to recover what he is equitably entitled to.

In all the cases which I have looked into (except the case in 2 Peters, hereafter referred to), in which the entire contract has been held void, there was either an express statute declaring that consequence, or the subject-matter was clearly immoral, contrary to the revenue laws, or to public policy, or if only wrong because merely prohibited, then it was found to be the essence of the contract itself—in other words, the entire contract was forbidden.

The excepted case is that of the Bank of the United States *v.* Owens, 2 Peters, 527. In that case the bank sued upon a contract as to which it stood admitted by the pleadings that it was founded upon a *corrupt and unlawful* agreement to take more than six per cent. interest *contrary to law* and the *fundamental articles* association. The charter of the bank contains a *provision against [272 the taking of more than six per cent. similar to the charter of the plaintiffs. Upon this case, Justice Johnson delivers the opinion of a majority of the court, that without reference to the Kentucky statute (the case was from Kentucky), the provision in the charter made the contract void on *general principles.* In regard to this question, he says, "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of violations of law?" Again, he says, "There can be no civil right where there can be no legal remedy, and

there can be no legal remedy for that which is itself illegal." Ib. 538, 539.

No one doubts these general principles, but their application in that case does not seem to be so clear.

Is it necessary that a court should refuse to permit the lender to recover back his money and legal interest in order to avoid being the "handmaid of iniquity?" What iniquity is there in allowing such recovery? Is there not much more aid given to iniquity by permitting the usurious borrower to retain what is in fact due to his creditor?

Certainly a court will not become "auxiliary to the consummation of violations of law;" and just for that reason they will not allow the usurious interest, which is the thing in which the violation consists, to be recovered.

The learned judge then cites the authorities upon which, in the close of his opinion, it is stated the decision of the majority of the court is founded. All the cases which are cited will be found to be clearly distinguishable from this case. In every one of them the essence and object of the contract itself were against law; the entire contract was held void because the entire subject-matter was prohibited.

For instance the case of Aubert *v.* Maze, 2 Bos. & Pul. 374, upon which great reliance is placed as showing that there is no distinction, in this respect, between *malum in se* and *malum prohibitum*, was an action by one partner for contribution on account of losses paid for insurance on policies underwritten by *joint agreement* between plaintiff and defendant. Such a partnership is illegal in England, and the consequence necessarily followed, that no contract touching it could be enforced. The money so paid, being all paid in violation of law, could not be recovered back. All the other cases cited stand upon the same footing.

This case in 2 Peters can not now be regarded as authority 273] *as it has been shaken, and in part overruled, in the case of the Bank of the United States *v.* Waggener and others, 9 Peters, 378.

So far as it expresses an opinion of even a majority of the judges of the Supreme Court of the United States, it is undoubtedly entitled to great weight, but not to greater, perhaps not to so great weight, as should be given to another opinion of the whole court,

delivered by Story, Justice, in the case of Fleckner *v.* Bank of the United States, 8 Wheat. 338.

That case also arose upon the same clause in the charter of the bank. The judge says, "The taking of interest by the bank, beyond the sum authorized by the charter, would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery."

But the case of the Lafayette Society *v.* Lewis, already referred to, is decisive of this point, and shows very conclusively that although the taking of interest beyond six per cent. be prohibited by law, *the contract* is not thereby avoided, but an action may be sustained to recover the money lent, and lawful interest. That case arose under the interest act of 1824. In the previous case of Reddish's Ex'rs. *v.* Watson, 6 Ohio, 516, it had been held that the act of 1824 did not prohibit the taking of interest beyond six per cent. when contracted for, and in delivering the opinion of a majority of the court in that case, Judge Wright observed that if it were to be regarded as a prohibitory law, the agreement for the excessive interest would act upon the contract and render it void. Ib. 516.

This case was expressly overruled in the Lafayette Society *v.* Lewis, in which it was held that the act of 1824 was a *prohibitory law;* and what consequence does the court deduce from that? That the prohibition enters into the entire contract and makes the whole void? No such thing; but only that the usurious interest shall not be recovered. See the case of Turner *v.* Calvert, 12 Serg. & Rawle, 46, precisely in point, and in accordance with the Lafayette Society case. Also, 2 Dallas, 92.

1. It is urged, therefore, for the plaintiffs, that they are entitled to recover the amount due on the bill, with interest, damages, etc., because the one per cent. was received in the purchase or discount of a bill of exchange, not by *way of interest*, but as *premium in* [274 *exchange*, and therefore is not a taking of more than six per cent. per annum on a loan or discount.

2. That if the one per cent. be established by proof to have been taken *for interest* beyond the six per cent., that the plaintiffs are, notwithstanding, entitled to recover the amount due on the bill for principal, interest, damages, etc., *less* the one per cent.

T. Ewing, for defendants:

It is a well-settled principle of law that if a contract be illegal, or against good morals, it is void. So also if anything that is illegal or immoral enter into the contract and form a part of it, the whole contract, which is one entire thing, is tinctured and contaminated with the vice, and is all void. Regent *v.* Roll, 7 Ohio, 77; Cro. Eliz. 199; Sid. 38.

Some cases have been cited to show that when illegal interest is *taken*, not *reserved*, it does not vitiate the contract. This is true in one condition of things. If a loan be made which is not usurious, and after the term of the loan has expired, the lender exact and receive usurious interest, it does not avoid the contract which was originally good. The subsequent illegal contract is *void*, it therefore can not vitiate a good contract, made prior to it, and into which it in nowise entered. Floyer *v.* Edward, Cowp. 112.

So likewise if there be two independent contracts between A. and B., one of which is usurious or otherwise illegal, and therefore void, and the other legal and valid, and they are both brought into one note—the *note* being contaminated by an illegal ingredient, is void, but it in nowise affects the original *valid contract*. *That* remains precisely as if no *void note* had been given. It is the security only that is void. But when the usury or illegality of any kind enters into the contract itself and forms part of it, then the contract, as well as the instrument by which it is evidenced, is wholly and absolutely void. The court *will* not enforce the contract as it is, and they *can not* make a new contract for the parties. The modern authorities have fully established this doctrine, especially when the contract is against the prohibition of a statute. 5 B. & A. 335; 1 Taunt. 136; 14 Mass. 322; 17 Mass. 281; 7 Ohio, 77.

The cases against the usury laws of Pennsylvania and Ohio seem to conflict with this principle, but they are founded on a supposed in-
275] tent of the legislature in the enactment of their several *statutes, and a regular series of judicial decisions in both those states steadily conforming to that supposed intent.

The usury law of Pennsylvania was copied from 12 Anne 2, c. 16, shortly after the enactment of that statute, omitting the clause which declares the usurious contract "*utterly void.*" The omission of that clause was taken by the court as an expression of the legislature of Pennsylvania, that they did not intend the usurious contract should be void in that province, and in a case

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decided by Judge McKean as early as the year 1775. 1 Dall. The court holds the contract void only for the excess.

This statute of Pennsylvania was adopted in the Northwestern Territory, and the decisions with it, and the subsequent legislation in Ohio has not been holden to vary this principle thus early settled.

But those statutes and decisions have no application in the case at bar. The plaintiff in this case who asks the court to enforce a contract tainted with usury, is a corporation whose law is its charter—whose existence and powers and capacities depend upon that charter, and upon that only. And in that charter there is a direct and positive prohibition against taking more than six per cent. interest. That prohibition has been disregarded. The law which gives this corporation its being has been violated in this contract; and there is no expression in legislative intent, and nothing of judicial construction in this state which stands between the party and that penalty which the general principles of law attach to its transgression.

The charter is a law, and it is the only law to which this plaintiff is amenable. 7 Ohio, 131. This contract was made in violation of that law. Not the bill of exchange merely, but the whole contract which the bill was given to secure. And the contract was one and entire, not made up of distinct parts which are capable of severance. The case stands distinctly and exactly upon the same ground with that of the Bank of the United States *v.* Owens and others, 2 Pet. 527.

That case, as it stood upon the pleading, was this: The prohibitory clause in the charter of the Bank of the United States, was the same precisely as that in the Chillicothe Bank. The bank had reserved, in discounting a promissory note of defendant more than six per cent. interest, and the question was whether the usury vitiated the whole contract, or whether it was void for the excess merely and good for the money actually lent and the lawful interest. Justice Johnson, in delivering the opinion of the *court, says: "The question here propounded has relation [276 exclusively to the legal effect of a violation of the provision *in the charter* on the subject of interest; and does not bring in question the operation of the statute of usury of Kentucky upon the validity of the contract. To understand the gist of the question, it is necessary to observe that although the act of incorporation forbids the taking of a greater interest than six per cent., it does not

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declare void any contract receiving a greater sum than is permitted. Most, if not all the acts passed in England and the states upon the subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law on general principles. The answer would seem to be obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they become auxiliary to the consummation of violations of law?"

The case of the Bank of United States *v.* Waggoner and others has been relied on by the plaintiffs' counsel, as somewhat shaking the authority above cited. But, in my opinion, it sustains it in all the points which are material in the determination of the case at bar. Although the *transaction* was the same, yet the facts of the two cases, as they were presented to the court, were materially different, and the learned judge, in delivering the opinion of the court in the latter case, 9 Wheat. 399, is careful to mark the distinction. He examines, in the first place, the question, whether the purchase of a promissory note was a *dealing* or *trading* within the prohibition of the bank charter, and refers to the opinion of the court *on that point*, delivered in the case of Fleckner *v.* United States Bank, 8 Wheat. 351, 352, and says, "to that opinion we deliberately adhere." He then says, in substance, that in case of the United States Bank *v.* Owen, it is said, that in the charter of the bank, "*reserving*" usurious interest must be implied in the word "*taking*," an "expression of opinion not called for by the certified question which arose out of the plea;" but he does not say that the implication is wrong or against law. He seems merely to hold it is an undecided question, because it was not necessary to decide it in either of the cases. It is true, he says, that there is a difference between *taking* and *reserving* illegal interest; *reserving* it, vitiates the contract, and makes it "*utterly void.*" "But if usurious interest be not stipulated for, but only taken *afterward*, then the contract is not void."

This is clearly law, upon the principle which I have already
277] *suggested. If the illegal interest be not stipulated for, but only taken *afterward*, it can not have a retroactive operation, and avoid a contract of which it forms no part. But if it be *stipulated* for at the time of making the contract, though it be not taken until *afterward*; or if it be taken in advance, or reserved in the

contract so that it enter into the contract *ab initio* and form a part of it, the whole contract is thereby made void.

There is nothing, therefore, in the case of the Bank of the United States *v.* Waggener, or the point therein recognized as settled, in the case of Fleckner *v.* United States Bank, which at all shakes the authority of the case of Owen and others *v.* The Bank. That case is admitted to be in point with the case at bar; it therefore ought to govern the decision, unless it be against the current of authorities, or wrong in principle or policy. I have already shown that it is fully sustained by the authorities; it is also right in principle.

The general statute touching interest does not bear upon the case, because it was provided for by the special law creating the corporation, which, since its acceptance, has become a compact. That law is, for the term of its expressed duration, immutable, except by forfeiture, or by another compact between the same parties. The bank is out of the reach, and beyond the pale of legislation. The law-making power is suspended as to its touching all things expressly provided for in its charter; and its legal rights and legal liabilities, its powers and duties, all that it may do and all that it must suffer, are fixed and determined by the single law of its creation. It is thrown upon its charter only, and the general principles of law as applied to the prohibition in that charter which it has violated. 7 Ohio, 131.

The taking of usury, then, is against this organic law to which the bank owes its being, and the act constitutes an offense which its own counsel admit would be adjudged criminal, perhaps capital, on a *quo warranto*. The contract which the court are asked to enforce, in part, has its origin in that offense, or to speak more accurately, it is itself the crime. Will the court then separate this contract into its elements—not *divide*, but *decompose* it—extract the legal ingredients from the vitiated mass, and cleanse, and purify, and make them valid? This is not done in the case of individuals, where their contracts are tainted with illegality or crime. Courts of law do not hang or imprison a man on one branch of his contract, and enforce the other in his favor.

Again, if this bank come into court to prosecute, it must come *with its charter in its hand, and claim a standing in court [278 by virtue of the provisions of that charter only; by that alone it exists, and beyond and without that, it has neither capacity nor

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attribute. It must, therefore, show that it has contracted pursuant to the charter, and then, under the authority of that charter, the court must enforce its contracts.

But what is the language of the bank in the case at bar? Here is my charter, by which I am authorized to contract and to sue; my compact with the state, by virtue of which I claim admission into your court; and here is my contract with the defendants, which I call upon you to enforce. It is true, in this very contract, I have violated my charter, and broken my compact with the state, by virtue of which alone I am authorized to stand as a party in your court; nevertheless I ask you to take cognizance of this contract, and enforce it, at least in part, in my behalf.

And further, the object of the restrictive clause in the charter is to prevent or remedy a mischief which the legislature foresaw would be incident to the corporation; and the law should be so construed by the courts as to effect the object of the legislature, by avoiding the mischief and advancing the remedy, and that with the least practicable injury to the party and the public.

Banks are created for the express purpose of lending money, and many privileges and immunities are bestowed on them that they may be enabled to carry on the business, profitably to themselves and beneficially to the community. But the strongest temptation to which they are exposed, the sin which of all others does most easily beset them, is that of usury; therefore, the first command of their creator, at the moment he breathed into them the breath of life, is that they shall *not commit usury;* and the courts are empowered and required to enforce and make effectual this inhibition. How is this to be done? Not surely by holding the usurious contract good for the money advanced, and void only for the excess; that would be inflicting no penalty, which would make them eschew the attempt as unprofitable and dangerous; it would only in some few rare cases disappoint them of their unlawful gains. In ninety-nine cases out of a hundred, they would actually get their usurious interest; in the hundredth case, they might lose the excess, but recover the debt, the legal interest and costs. The business would be still profitable. It would be for their interest to violate the prohibition in their charters continually, and those who should oppose the recovery of the excess, in 279] any case, would do it at the expense of costs and *counsel fees; much beyond the amount that would be saved by the con

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test. The point would, therefore, be yielded by a general acquiescence, and the evil endured, or resort must be had to the *quo warranto* to restrain it. Whether on that writ, the facts being found, the court might pass sentence of punishment and prevention merely, or whether they must pronounce judgment of forfeiture and declare the corporation dissolved, I am not prepared to say; but if the latter, it would cause injury and misfortune to the community, which it should be the object of every department of our government to avert. The simple and effectual remedy is the one which an application of the well-settled principles of law to the case indicates. Hold the illegal contract void in all its parts, refuse the aid of the court to enforce it, let the attempt at illegal gain involve a certain loss, and there is no danger that such attempts will be repeated.

G. SWAN opened the argument for the plaintiffs, and J. C. WRIGHT closed the argument for the defendants, but the reporter has not been furnished with their arguments, nor any brief of them

Judge HITCHCOCK delivered the opinion of the court:

In considering this case we are first to inquire whether the replications to the special pleas in bar are in law a sufficient answer to those pleas; and, in order to settle this question, it is necessary to ascertain the substance of those pleas. Stripped of their verbiage, they contain the charge that Paddleford, being in want of money, applied to the plaintiffs for a loan, and that an unlawful, usurious, and corrupt agreement was entered into between the plaintiffs and Paddleford, whereby they undertook to furnish him with the money by discounting a bill of exchange at and for a greater rate of interest or discount than six per cent. per annum, in pursuance of which unlawful agreement the money was furnished, and the bill in controversy was discounted at a greater rate of interest than six per cent. per annum, which conduct of the plaintiffs, it is claimed, is in contravention of the general law of the land, and of their special law of incorporation.

In answering these pleas the plaintiffs neither admit nor deny this agreement, or that it was carried into effect. They neither traverse the matters set out, nor do they confess and avoid. They merely assert that the bill of exchange was drawn "for a good and legal consideration, and not in pursuance of, or upon the said *unlawful, corrupt, and usurious agreement, nor for the [280

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purposes" in the first and following pleas alleged. This, so far, is no answer to the pleas. There is no allegation in the pleas that the bill was not drawn for a good and legal consideration, or that it was drawn in pursuance of any unlawful or corrupt agreement. The charge is, that after the bill was drawn, a "corrupt" agreement was entered into for its discount, and this is neither confessed nor denied by the replication. The replications next aver that the plaintiffs "*purchased* the bill of exchange from the said drawers for a good and valuable consideration, to wit, for," etc., and close, by tendering an issue to the country. There can be no doubt that each of the replications present a variety of points, and is multifarious. Each attempts to put in issue matters which are immaterial. The matter introduced into each is new, and, of course, they should have concluded with a verification. Two replications, too, are in effect put into each plea, which is not allowable. For these reasons, as well as for others which might be stated, we hold the replications to be defective in point of form, and bad in special demurrer.

The plaintiffs do not seem, however, to have placed much reliance upon their replications, as they have scarce made an effort to sustain them. The great question in the case is, whether the facts set forth in the pleas constitute a defense to the action. This question has been argued by the counsel with much earnestness and with great ingenuity. It is one of much importance, and is certainly not without its difficulties. We have examined it with care, and have been enabled to come to a conclusion without any difference of opinion.

The facts set forth in the plea show that the consideration passing from the plaintiffs, a banking company, for this bill of exchange, was a loan of money, and that this loan was effected at a rate of interest greater than six per cent. per annum. It can make no difference that the contract, received by the plaintiffs to secure the payment of this money, is a bill of exchange, and not a promissory note. If, under the circumstances of this case, a promissory note would be void, then this bill of exchange must be void.

It is contended by defendants' counsel that this contract is void, etc., being contrary to and against the statute law of the state regulating interest, and many authorities have been cited to sustain this position. Our statute regulating interest provides "that

all creditors shall be entitled to interest on all money after the same *shall become due, either on bond, bill, or promissory [281
note, or other instrument of writing, or contract for money or property, on all balances due on settlement between the parties thereto, or money withheld by unreasonable and vexatious delay of payment, and on all judgments obtained from the date thereof, and upon all decrees obtained in any court of chancery for the payment of money, from the date specified in the said decree for the payment thereof; or if no delay be specified, then from the day of the entering thereof, until such debt, money, or property is paid, at the rate of six per cent. per annum, and no more. 29 Ohio L. 451. This law fixes the rate of interest, but it does not affix a penalty if any person shall receive more than the rate thus fixed. It does not declare a contract for the payment of a greater rate void, although it does, to my apprehension, prohibit the taking of a greater rate. The authorities cited, some of them at least, show that in cases where statutes against usury do not annex any penalty, or do not declare usurious contracts void, courts have declared them void as against positive law.

We agree with counsel that contracts made against good morals, against public policy, and against positive law, are, as a general rule, void; and it is possible that if there had been no statute in Ohio previous to the one before recited, and we were now called upon for the first time to give that statute a construction, we might say that a contract reserving more than six per cent. interest on the principal sum loaned was void, as being contrary to that statute. But this is not the first time this question has been before the court, and if the construction of any one of our statutes can be considered as settled by judicial decision and practice it is this. 7 Ohio, 83. We have held that a contract reserving interest at the rate of more than six per cent. per annum is not void, but that upon such contract a plaintiff may recover the principal sum, together with six per cent. interest. As, however, counsel seem so confident that this principle is not in accordance with the general rules of law, it may be well to look back and see what has been the course of legislation in the state upon this subject, and inquire whether the practice of the courts has been such as to carry into effect the legislative intention.

The first law upon this subject, within the territory now constituting the State of Ohio, was enacted by the territorial legis-

lature, and approved November 15, 1799. I say this was the first law upon the subject of interest. True, a law was published by 282] the *governor and judges on July 14, 1795, declaring the common law of England, and all English statutes in aid of the common law, passed prior to the fourth year of the reign of James I, to be in force in the territory. 1 Chase's Ohio L. 190. And if this law was adopted in conformity with the authority of the tribunal publishing it, then the English statutes upon the subject of interest and usury were in force here from 1795 to 1799. By the ordinance of 1787, the governor and judges of the Northwestern Territory were authorized to adopt and publish "such laws of the original states" as might be necessary for the well-being of the territory. Beyond this their legislative power did not extend. 1 Chase's Ohio L. 67. And it might be difficult to maintain that under this authority they would have a right to adopt the English statutes in bulk, because those statutes had thus been adopted in one of the original states. The law of July 14, 1799, before referred to, was adopted from Virginia. 1 Chase's Ohio L. 190. This, however, is a question of mere curiosity, and can be of no practical importance at this late period.

The territorial act of November 15, 1799, "regulating the interest of money," etc., fixed the rate of interest at six per cent. But it inflicted no penalty for reserving or taking a greater rate; it did not declare any contract made with that view void, nor did it create any forfeiture of the principal sum. The only forfeiture incurred under that act was the forfeiture of the entire interest. It was expressly provided that the lender might recover the principal sum loaned, after deducting whatever payments had been made by way interest. 1 Chase's Ohio L. 217. This statute recognized the principle that a contract might be "good in part and void in part." The provisions of this statute, it is believed, were novel, and they are certainly entirely at variance with the provisions of the English statutes, and with the provisions of the pre-existing statutes of the "original states" upon the same subject. This difference may be accounted for in the change of opinion upon the propriety of the prohibition of usury. At the time of the enactment of the statute of Henry VIII, and of the other English statutes, to demand or to receive usury (and all interest was considered usury), was deemed to be highly immoral, if not a deadly sin. Most of the statutes of the original states

were copied from these English statutes, and enacted under the same state of feeling. This state of feeling, too, unquestionably influenced the courts in giving construction to those statutes. But in 1799, as well as since that period, it was and has been a mere question of *policy whether interest should be regulated by [283 law, and to what extent.

This law of 1799 continued in force until December 29, 1804, when it was repealed by another act upon the same subject. This act of 1804 fixes the rate of interest at six per cent. per annum, and provides, that if any person shall demand or receive more than at this rate, "such person shall forfeit the whole amount of the debt on which such illegal interest was *charged* or received," the one-half to be paid into the county treasury, and the other half to the informer or the person prosecuting. This statute is substantially, if not literally, the same with that of Pennsylvania upon the same subject, and was probably copied from the laws of that state. In the case of Wycoff *v.* Langbrad, 2 Dallas, 92, decided in 1785, which was an action on a promissory note, to which the defendants pleaded the act of assembly against usury, the Supreme Court of that state held, "that when more than legal interest was included in any note, bond, or specialty, the whole amount could not be sued for and recovered; but the plaintiff was entitled, in such case, to a verdict for the just *principal and lawful interest.*" The same doctrine is held in a more modern case (12 Serg. & Rawle, 46), and this is considered as a settled rule in Pennsylvania.

Is it strange that when the legislature of Ohio passed a law substantially the same with that of Pennsylvania, that the courts of Ohio should put upon that law the same construction which had been put upon it by the courts of Pennsylvania? It would have been strange if they had done otherwise. Especially when it is remembered that at that early period a great plurality, if not majority, of the citizens of Ohio, were emigrants from Pennsylvania, and had more frequent and easy intercourse with that state than with any other in the Union.

The courts of this state did put the same construction upon the statute of Ohio, and it is believed there was not, while the act of 1804 continued in force, a single case in which a contract for the payment of more than six per cent. interest was held to be void. On the contrary, in such cases, a plaintiff was allowed to recover

"the just principal and lawful interest." If this was contrary to the legislative intentions, would not the law have been changed? It was in reference to this course of practice that the court say in Smith v. Parsons, 1 Ohio, 239, in speaking of laws against usury, "should such a law enact, that a lender may receive from a borrower six per cent. interest and no more, and should an after-
284] *contract contain an express promise to pay ten per cent., such a contract, although voluntarily made for the payment of a specific sum of the contract, would be entirely destroyed, and the obligor released from the payment of both principal and interest.

This law of 1804 continued in force twenty years, and was then repealed by the act of January 24, 1824, which has been already recited and which continues still in force. The act of 1824 is the same with that of 1804, with the exception of the clause of forfeiture. And it would have been strange indeed, if a court which held an usurious contract to be only void in part, under the law of 1804, which contemplated a forfeiture, should hold the whole contract void under the law of 1824, under which there can be no forfeiture. In truth, until the present case arose, the only controversy about the law of 1824 has been, whether it contained any prohibition of usury at all, it being insisted by many that it was only intended to fix the rate of interest where the parties to a contract had not themselves fixed it; and that parties might contract for the payment of any rate of interest they might think proper, which contract would be enforced in the judicial tribunals of the country. This was not the construction put upon the law immediately after its enactment; but the same practice was adopted under it, so far as the parties to a contract were concerned, as under the law of 1804. And such has been in this court, with but little variation, the uniform practice under it until the present time. 7 Ohio, 83.

From the foregoing remarks, it will be seen that from 1804 to the present period, there has been no time in which an individual might not recover the principal sum of money loaned, together with lawful interest, notwithstanding by the terms of the loan he was to have received a greater rate of interest.

But we are now urged to review former decisions, and to give such a construction to the interest law as will make all existing contracts, as well as all that may hereafter be entered into, for the payment of more than six per cent. interest, void. And what reason

is urged why this should be done? Not that any injustice is done by the law as hitherto understood and construed, for it has been admitted in argument that the borrower of money at a usurious interest, although at law he might avoid the payment of the whole, yet in conscience would he be bound to repay the principal sum with lawful interest. Our law, then, only compels a man to perform that which, in conscience, he is bound to do. And of *a construction which produces no other effect than this, [284 there certainly ought to be no complaint.

It is argued, however, that upon similar laws the courts of Great Britain and of some of our sister states have decided differently. And it is supposed that those courts would have decided differently upon our own statute. It may be, and probably is so. I would at all times pay great deference to the decisions of the courts of England and of our sister states, but I would not change the construction of a statute which has prevailed for almost forty years, and which operates justly, because originally a different construction might have been put upon the same statute by a court of some other country. I would not do it even if I believed the original construction to have been wrong; for it would be far better to adhere to a construction thus long persevered in, and which confessedly contributed to abstract justice, but which was technically incorrect, than to make a change after so great a lapse of years. The statute regulating the rate of interest as construed by this court is now well understood. Contracts may have been made with reference to that construction, and which, according to that construction, are valid in part, if not in whole. Adopt the construction contended for by the defendants' counsel, and the validity of these contracts would be impaired. Not, it is true, by a legislative enactment; that could not be done (it is prohibited by the constitution), but by a judicial decision of this court, reversing the whole current of its previous decisions upon the same subject for more than thirty years. If there be anything wrong in the law, it is within the legitimate province of the legislature to correct the evil; not, it is true, so far as subsisting contracts are concerned, but so far as contracts hereafter may be made.

Upon the whole, we entertain the opinion that the contract in the case under consideration is not void as being against the general law of the state upon the subject of interest.

The next and more important question is, whether this contract

is void as having been made in violation of the act incorporating the Bank of Chillicothe. That clause in the charter which is supposed to have been violated is in section 20 of the act, and in the following words: "The said corporation shall not take more than at the rate of six per centum per annum on its loans or discounts." 3 Chase's Ohio L. 20, 29. It will be observed that the language here used is substantially the same with that used in the statute regulating interest. By this latter act, all creditors are entitled to interest, "at the rate of six per cent. per annum, *and no* 286] **more;*" while in the act of incorporation, the phraseology is, "The said corporation shall not take more than at the rate of six per centum per annum," etc. And it is insisted by the plaintiffs' counsel, that inasmuch as this court hold that a contract between individuals, for the payment of more than this rate of interest, is only void as to the excess over and above six per cent., that the same rule shall be applied in the construction of similar contracts made by this corporation. There is certainly much plausibility and no little force in the argument. But there is another question involved in construing a contract made by a corporation, and that is the question of capacity of the corporation to make such contracts. There is a great difference between natural persons and corporations. Natural persons have capacity and power to make and enter into any contracts which are not prohibited by law, and will be bound by such contracts. In the absence of any law upon the subject of interest, such persons might legally make contracts for the payment of ten, fifteen, or twenty per cent. interest for the use of money, and at law such contracts must be enforced. Nor would there be any more impropriety in the conduct of a man who should demand an extravagant rate of interest, than in the conduct of him who should demand an extravagant price for his goods and chattels. He might be guilty of a violation of the laws of conscience in taking advantage of the necessities of his neighbor, but would not be guilty of a violation of the laws of the land. True, if the terms of a contract were such as to shock the feelings, a court of equity might relieve against it, but at law it would be obligatory. Still, although such are the principles which prevail with respect to natural persons, the contracts of infants and *femes covert* are not in general binding upon them, but are void or voidable. There is a particular class of contracts, however, by which even infants will be bound, and these are con-

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tracts for necessaries. Such are the general rules of law relative to the contracts of natural persons.

But it is otherwise with corporations. A corporation is a body created by law, composed of individuals united under a common name, and having succession while it shall exist. It is the creature of the law, and derives all its powers and capacities from the law of its creation. "The modern doctrine is, to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. 2 Kent's Com. 298; 2 East; 2 Cranch, *127; [287 4 Wheat. 636; 4 Pet. 152; 15 Johns. 358; 5 Conn. 560; 3 Pick. 232.

As a corporation is created by law, it is proper that in all cases where it attempts to act, it should show, by its charter of creation, it has power so to act. For a corporation, created for the purposes of constructing a railroad, or of acting as a library association, to carry on banking operations, and to claim to do it under its charter, would be absurd, unless the power so to do was expressly or by implication authorized in its charter. If an agent is restricted by the power received from his principal, if the legislature of the state can not transcend the powers delegated in the constitution, much less can a corporation go beyond the charter by which it exists. There is great propriety in holding corporations to the strictness of the law by which they were created, when it is considered that a charter granted to a private company is in the nature of a contract, and can not subsequently be revoked by the power which granted it without a violation of the constitution of the United States, which is the supreme law of the land.

The president, directors, and company of the Bank of Chillicothe, plaintiffs in this suit, were incorporated February 18, 1808; and, by their act of incorporation, they are "made able and capable, in law, to have, receive, purchase, enjoy, and retain to them and their successors, lands, tenements, hereditaments, goods, chattels, and effects of what kind, nature, or quality soever, and the same to sell, demise, grant, alien, or dispose of; to sue and be sued," etc., and generally to do all acts it may to them appertain to do, subject nevertheless to the restrictions and limitations in the act subsequently prescribed and declared." 3 Chase's Ohio L. 20, 27. In section 15 of the act, it is declared "that the lands,

tenements, and hereditaments, which it shall be lawful for said corporation to hold, shall be only such as shall be requisite for its accommodation in relation to the convenient transaction of its business; or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or purchased at sales upon judgments which shall have been obtained for such debts; and the said corporation shall not, directly or indirectly, deal or trade in buying or selling any goods, wares, or merchandise or commodities whatever, except in selling the same when truly pledged to it by way of security for any debt due the said corporation; or purchasing the same at sales on judgments which shall have been obtained for any debts previously contracted in 288] *the course of its dealings." And section 20 is as follows: "That the said corporation shall not take more than at the rate of six per centum per annum on its loans or discounts." The continuance of this corporation is limited to January 1, 1818, but was afterward extended to January 1, 1843, by the "act to incorporate certain banks therein named, and to extend the charters of existing incorporated banks," passed February 23, 1816. 2 Chase's Ohio L. 913. And, by this latter law, this bank, with others, was authorized to take interest at the rate of six per centum per annum, *in advance*, upon its loans and discounts, and no more.

Taking this law in its several parts, it empowers this corporation to carry on banking operations, and to "do all acts it may appertain to them to do" as a banking company within the restrictions prescribed.

It has power to hold land, but it shall be only such and so much as is necessary for its accommodation, relative to the convenient transaction of its business; or such as may have been mortgaged to it to secure, or conveyed to it in satisfaction of a debt, or such as shall have been purchased at sales upon judgments obtained for its debts.

It has power to deal in goods; but it is only in selling such as have been truly pledged to it in security for any debt due, or purchasing the same at sales on judgments which shall have been obtained for debts previously contracted in the course of its dealings.

It has power to loan money or to discount bills or notes; but it can only be done at a rate of interest at or under six per centum

per annum, in advance. Beyond this, it has no more power or capacity to go, than it has to engage in any commercial or manufacturing transaction.

Suppose this corporation should enter into a contract for the purchase of a tract of land, not for its convenience—not for the payment of a debt to it due, but for the purposes of speculation, could it enforce such a contract? A natural person might enforce a similar contract, but this corporation could not, for the simple reason that for the purposes of such a contract it has no existence. It has no power, no capacity.

The same would be the case with respect to a contract relative to goods, not within the terms of its charter.

If it be true that contracts authorized by the charter relative to lands or goods are void, upon what principle shall we apply a different rule as to money contracts? This corporation has power *to loan money, provided it loans it at a rate of interest not [289 exceeding six per cent. interest per annum; but it has no power or capacity to loan money at a rate above and beyond this. And if a contract, as before stated, relative to lands or goods would be void, certainly the unauthorized, the forbidden contract with respect to money must be. That such a contract is void, is fully sustained by the opinion of the Supreme Court of the United States in the case of the Bank of the United States v. Owens and others, 2 Pet. 527.

The pleadings in the case before the court show that here was a loan of money, and a contract for the repayment of the principal sum with interest, at a greater rate than that authorized by the plaintiffs' act of incorporation. This loan was effected by the discount of the bill of exchange now in suit. This contract is void, not because the rate of interest is greater than the rate allowed by the general law of the land, but because it is such a contract as the plaintiffs had no capacity or power to make.

In the present state of pleadings, the plaintiffs have no title to recover, but on their motion, leave is given them to amend.

LESSEE OF WILLIAM LITTLE ET AL. *v.* J. S. AND C. LAKE.

The estate acquired by an illegitimate offspring, who survives the mother, does not, in case of intestacy without issue, pass to the maternal line.

THIS was an action of ejectment from Wayne county. The facts were agreed by the counsel for the plaintiff and defendant, and are fully stated in the opinion of the court. The case was argued by AVERY, SILLIMAN and COX, for the defendants. JARVIS, who was counsel for the plaintiff, submitted it without argument.

Judge GRIMKE delivered the opinion of the court:

This was an ejectment, of which an agreed case has been made, and the facts are simply these: William Gooden, deceased, under whom both parties claim title, acquired the land in controversy, by purchase. He was an illegitimate son of Mary Hodges, formerly Mary Hurlbut; and died in December, 1834, intestate. His widow survived him a short time, and died, leaving the lessors of the plaintiff, her brothers and sisters, her heirs at law. 290] *Mary Hurlbut, the mother of William Gooden, died before him, leaving no issue except himself, and her heirs at law, her brothers and sisters, survived both William Gooden and his wife, and conveyed the premises in question to the defendants.

The statute in force at the death of all the parties mentioned, was passed February 24, 1831 Section 5 enables the mother to inherit, and section 6 provides for the inheritance of kindred more remote; and the only contingency upon which the widow becomes heir is mentioned in section 7, and is where there is no heir of the blood of the intestate. If, then, William Gooden had been a legitimate child, the title of the defendants could not be disputed, and the only question is, whether section 12 has removed the disability arising from his illegitimacy. This is its language: "Bastards shall be capable of inheriting, or of transmitting inheritance on the part of their mother, in like manner as if they had been born in lawful wedlock." What interpretation shall be given to these words *on the part of the mother?* The counsel for the defendants would contend, that it means from or through the mother; that it connects the bastard with the ancestral and descending lines of the mother, and through her collaterally with all who are of her blood. But the expression on the part of the

mother, does not carry the mind beyond the mother, unless connected with words of more comprehensive meaning—such as ancestors on the part of the mother, or descendants on the part of the mother. The words *ex parte materna*, have an established legal meaning, importing only lineal descendants, and is opposed to the words *ex linea materna*, which denote a capacity of both lineal and collateral inheritance. The law does not declare, that natural children shall be considered as lawfully born of their mother, for all the purposes of inheritance. It has conferred on them two capacities of inheritance only.

In the case of Stephenson's Heirs *v.* Sullivant, 5 Wheat., it is said to be the first time that that court had been called upon to give a construction to this part of the statute of Ohio, and I believe it is the first time that this court has been obliged to define its true meaning. In that case, the question was substantially the same, only the condition of the parties was reversed, the claim being there *to transmit* inheritance to a bastard, on the part of the mother, while here it is to derive inheritance from him through the same channel. The court say, "before the statute, the current of inheritable blood was stopped in its passage from *and through the mother, so as to prevent the descent of [291 the mother's property, and of the property of her ancestors, either to her own illegitimate children, or to their legimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother. But although her bastard children are in these respects *quasi* legitimate, they are nevertheless, in all others, bastards; and as such, can have neither father, brothers, nor sisters."

If William Gooden had died before his mother, she would have inherited the estate from him; and her brothers and sisters would have a capacity to inherit directly from her. But the law has not removed all the disabilities of bastards. It has permitted an inheritance from or to the mother; but it has not permitted it from or to collaterals, merely because they are connected with the mother. William Gooden, therefore, died, leaving no one next of kin, and the estate, by section 7 of the statute, devolved upon his widow, and the lessors of the plaintiff are therefore entitled to recover.

Those who framed the late revised code of New York, seem to have been aware of the *apparent* difficulty which might grow out of the strict phraseology which is used in the Ohio statute; and they have removed it by employing language which is at once clear and precise. "In case of the death, without descendants, of an intestate who shall have been illegitimate, the inheritance shall descend to his mother. *If she be dead, it shall descend to the relatives on the part of the mother, as if the intestate had been legitimate.*" The addition of these words would have been necessary in the statute of Ohio, to authorize the defendants to recover.

292] *FARMERS' BANK OF CANTON *v.* TIMOTHY BRAINERD ET AL.

A bill of exchange drawn upon a person in Ohio, payable in New York, and protested for non-payment, does not entitle the holder to six per cent. damages for protest.

THIS case was reserved in the county of Portage.

It is an action of assumpsit, brought against the defendants as drawers and indorsers of a bill of exchange.

The case was submitted to the court on the following agreed state of facts: Timothy Brainerd and Ward Pendleton drew a bill of exchange (which is the subject matter of the suit) on Joy H. Pendleton, payable at the office of John Ward & Co., in the city of New York, for $4,000, ninety days after date. The bill was protested for non-payment. Joy H. Pendleton, at the time the bill was drawn, resided in the township of Franklin, in the county of Portage, and has ever since resided in the same place. It was further agreed that the amount due upon said bill, including interest and costs of protest, was $4,281.88; and that if in the opinion of the court the plaintiffs were by law entitled to six per cent. damages under the statute as on a protested bill of exchange, then judgment should be rendered in their favor for $4,521.88; but if the plaintiffs were not entitled to the six per cent. damages, then judgment should be rendered in their favor for the aforesaid sum of $4,281.88.

HARRIS, for plaintiffs, submitted no argument.

COCHRAN, for defendants, insisted:

That inasmuch as the drawee of the bill resided in the State of Ohio, the plaintiffs were entitled to recover no more than its face, with the interest, and urged that it was the place of residence of the drawee which gave character to a bill, and settled the question whether it was foreign or inland. He cited 6 Mass. 157; 3 Marsh. 488; 29 Ohio L. 452.

Opinion of the court, by Judge HITCHCOCK:

The only question for the decision of the court in this case, is whether the plaintiffs are entitled to six per cent. damages, under our act of assembly, "ascertaining damages on protested bills of exchange." In the first section of this act, it is provided, "that when any bill of exchange shall be drawn for the payment of any *sum of money, and such bill shall be legally protested for [293 non-payment or non-acceptance, the drawer or drawers, indorser or indorsers, shall be subject to the payment of twelve per cent. damages thereon, if drawn on any person or persons, or body corporate, without the jurisdiction of the United States; and six per cent. damages therein if drawn on any person or persons, or body corporate, within the jurisdiction of the United States, and without the jurisdiction of this state; and the bills shall in all cases bear an interest of six per cent. from the date of the protest, until the money therein drawn for shall be fully satisfied and paid." 29 Ohio L. 452. The words of this section are clear and explicit, and would not seem to leave any room for construction. Damages are made to depend not upon the place of payment, but upon the place of residence of the drawee. If he reside without the jurisdiction of the United States, and the bill is protested, twelve per cent. damages attach; but if within the jurisdiction of the United States, and without the jurisdiction of this state, then six per cent. Before the holder of a bill can claim these damages, he must bring his case within the letter of the statute. The damages allowed are in the nature of a penalty, and in such case it is not proper to extend the operation of a statute by construction, beyond its plain and obvious meaning as collected from its words. In the case before the court, although the bill was payable in New York, the drawee was a resident of Ohio; of course the plaintiffs are not entitled to the damages.

If authorities are necessary to sustain this decision, the case of Clay *v.* Hopkins et al., 3 Marsh. 488, is in point. The statute of Kentucky, upon this subject, is substantially the same with that of Ohio, except that in that state the damages upon a protested bill of exchange are ten per cent. Clay drew upon Hopkins, both being residents of Kentucky, certain bills payable in Baltimore. These bills were afterward protested. The court held that the plaintiff could not recover the damages, inasmuch as the drawer, at the time the bills were drawn, was not residing without the state of Kentucky.

The case of Grimshaw *v.* Bender et al., 6 Mass. 157, is, if possible, still stronger. This was an action on a bill of exchange, drawn at Manchester, in England, upon an American house, having their domicile in Boston, Massachusetts, and payable six months after date, in London. On the day of its date the bill was accepted at Manchester, by one partner of the house upon which it was 294] drawn, then in Manchester, and was afterward protested *for non-payment. Here was a bill drawn, accepted and payable in England, and yet the court held that it was a foreign bill, because drawn upon a house domiciled in America, thereby establishing the principle that the place of residence of the drawee, and not the place of acceptance or payment, gives character to a bill.

Whether if a bill were drawn upon a citizen of Ohio, temporarily residing in New York, and accepted by him in New York, and afterward protested for non-payment, the holder would be entitled to recover the six per cent. damages, we do not undertake now to determine. The last cited case of Grimshaw *v.* Bender et al., would seem to militate against such claim. That it would be decisive of it, I am not prepared to say.

In accordance with the agreement of the parties, and the opinion of the court, judgment will be rendered in favor of the plaintiffs for $4,281.88, and costs of suit.

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William E. Smith v. The State.

An indictment designating the accused by initial letters, as a baptismal name, is good after verdict.

It is no ground for arrest of judgment, that the accused went to trial without a copy of the indictment, no exception being taken until after the verdict.

Error to the common pleas of the county of Trumbull. The plaintiff in error was indicted at the November term, 1837, under section 28 of the act of March 7, 1835. The section is in these words: "That if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this state, *or shall utter, or put off counterfeit coin or coins, knowing them to be such*, etc., every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen, nor less than three years.

The indictment contains three several counts, charging the plaintiff in error, substantially in the same terms, with uttering and putting off certain pieces of counterfeit coin, called *sixpences, fips, six and one-fourth cents*, and *head pistareens*, etc., "of the likeness and similitude of the good, *legal*, and current money and silver coin, *currently passing in the said State of Ohio*, etc., then and there knowing them to be such," etc. And in each of the counts the plaintiff in error is presented by the name and description *of [295 "W. E. Smith, late of the township of Youngstown," etc.

The accused was arraigned at the same term, pleaded not guilty to the indictment, was tried and convicted. His counsel then filed a motion in arrest of judgment, for the following reasons:

1. Because said indictment is altogether uncertain, and wholly insufficient, in this, that it does not designate the accused by any *christian* name, nor does it state that the accused is a *transient* person, or that his said christian name is *unknown*.

2. Because said accused was not furnished with a copy of the indictment, at any time, before his said trial by the jury, as appears from his affidavit hereto annexed.

3. Because in each of the counts of the indictment, it is averred that the said counterfeit coins are counterfeits of the good, *legal*, and current coin, passing, etc., whereas the same are not counterfeits of the *legal and current coin, passing*, etc.

This motion was overruled, the plaintiff in error sentenced to imprisonment in the penitentiary, and judgment rendered against him for the costs of the prosecution.

CROWELL and TAYLER, for plaintiff in error. 10 Pet. C. L. 319; 10 East, 83; 1 Pet. 224; 3 Bac. Abr. 315, 316.

No argument was offered for the state

Judge WOOD delivered the opinion of the court

The errors assigned, upon this record, by the plaintiff's counsel, are two: 1. The overruling of the motion in arrest. 2. The rendition of judgment and sentence on the verdict of the jury. Both assignments may, however, be consolidated and discussed as a single proposition, or the last may be left untouched, as depending upon the first, or growing out of it as a corollary; for if a motion in arrest be overruled, as a general principle, judgment or sentence follows on the verdict. The whole inquiry, then, resolves itself into this: *Did the court below err in overruling the motion?*

It is urged by the plaintiff's counsel that the *christian* and surname of the party indicted ought to be accurately stated; and, if the prisoner is a transient person, and refuses to disclose his name, he should be presented as a person to the jurors unknown, but who is brought before the jurors, by the keeper of the prison; that the object of giving an accused a name, is to distinguish 296] him *from others; that *christian* names are the means by which one is known from another. That if the *christian* name is mistaken, it is fatal to all legal instruments. That a declaration against "*W. E. Smith*" would be bad, and a judgment rendered upon it would be reversed on error. That in *criminal* proceedings, greater strictness is required, and the record should be so perfect as to be a bar to a subsequent prosecution for the same crime, and that this record is not of that character.

With deference to the opinions of the learned counsel, we are not able to discover the application of the argument to the case before us. The indictment, it is true, is loosely and unskillfully drawn. The pleader has not adhered to the ordinary forms, which the rules of "*safe precedent*" require to be pursued. A plea in abatement would have been fatal to it; and on such a plea the argument of the plaintiff's counsel would not have been successfully resisted. But, after verdict, to arrest the judgment for the reason suggested, would overrule the authorities of Coke,

Hale, and Hawkins, and a modern, but learned criminal lawyer, Archbold.

In 2 Hawk. P. C. 23, section 125, it is said, if there be no addition or a wrong one, the defendant can take advantage of it by a plea in abatement *only;* and Hawkins is sustained by Rex *v.* Warren, 1 Siderfin, 247, and by 2 Inst. 670; and it is further said, if he pleads over, he thereby waives all objections to the indictment, on that account. So, if there be no *christian* name, or a wrong one, or no surname, or a wrong one, the defendant can take advantage of it by plea in abatement only; and if he plead over, he waives the objection. 2 Hale, 176; also 2 East, 175; and these authorities are cited by Archbold with approbation. Arch. Crim. Pl. 30.

It is secondly contended that the court erred in placing the plaintiff in error on his trial before he was furnished with a copy of the indictment. That the law is imperative, and that the prosecution might as well dispense with an indictment, and force the accused to trial on an *oral* accusation, as to dispense with this requisition of the statute in this particular.

We do not accede to this reasoning of the counsel. An indictment, or presentment, is required by the fundamental law of the land for every criminal charge; and it is declared that no person shall be put to answer *in any other manner.* An indictment or presentment is, therefore, necessary to confer jurisdiction upon the court over the person accused. It can be obtained in no *other way, not even by consent, but the statute requiring [297; a copy of the indictment to be furnished the accused *twelve hours* before trial is merely a directory provision. It refers only to the *time* of trial—it shall not be until twelve hours after the copy; but it has nothing to do with the jurisdiction of the court, that is already acquired by the indictment. And in any other respect, except in relation to jurisdiction, a party may waive provisions in the law intended for his benefit, or make any agreement for the disposition of his case, whether civil or criminal, as a general rule. If the accused insist upon such copy, or rather, if he do not waive his right, in this respect, and is forced to trial without it, and against his own consent, it would most clearly lay the foundation for a motion for a new trial; and if the facts appeared on the record, a motion in arrest of judgment, or a writ of error, might be sustained. Such is not the case here. For aught that appears,

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the plaintiff in error was placed on his trial with his own consent. There was no objection for the want of a copy of the indictment. Such copy, then, must be considered as waived, and it does not lie in his mouth to say that it was not furnished. To suppose the legislature intended a copy to be delivered when it was not required, but waived, would be to suppose they intended to complete the performance of an act, without any definite object, use, or benefit, and to deprive the accused of the right to agree when his trial should take place.

It is *lastly* argued, that the indictment does not follow the language of the statute, nor that of any known form; that it is full of senseless verbiage, and repetitions characteristic of the *unskillful pleader*. That from the description of the coin in the indictment, it is plain the coin there mentioned is not the legal current coin, *passing in the State of Ohio;* that although it is not necessary that it should be such coin, to constitute the offense, the averment being made, it *must be proved.*

The indictment, as we have before said, on another point, is not well drawn. It is not claimed, however, that it does not contain enough to constitute the crime; but that it contains *too much.* The law is, that an indictment for an offense against the statute, *must*, with certainty and precision, charge the defendant with having committed, or omitted the acts, under the circumstances, and with the intent mentioned in the statute; and if any one necessary circumstance or ingredient be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. *The defect will not be aided by verdict.* 2 East, 333.

298] *It is said to be much better to pursue, strictly, the words of the statute, as it precludes all question about equivalent expressions. Arch. Crim. Plead. 52.

The statute, in this case, makes the crime the *uttering and putting off the counterfeit coins, knowing them to be such.* This is averred in each of the counts, in the words of the statute, to which the pleader has added, that the *coins were legal and currently passing in the said State of Ohio.*

If it be necessary, as contended by the plaintiff's counsel, to prove this last averment, it would, after verdict, be presumed that such evidence was given; because the court will make every reasonable intendment to support a verdict where the record furnishes no proof to the contrary. We hold, however, such proof

to have been unnecessary, as the indictment combines every ingredient, and circumstance, necessary to constitute the crime, without the words, *legal and currently passing in the said State of Ohio*, and *these words* should, therefore, be rejected as surplusage. 4 Coke, 41; 5 Coke, 121; 2 Leach, 593; 3 Stark. 26; 6 Ohio, 437.

Judgment affirmed.

LESSEE OF THE CITY OF CINCINNATI *v.* THE FIRST PRESBYTERIAN CHURCH.

Statute of limitations runs against a town or city corporation.

THIS cause was adjourned from the county of Hamilton, and came before the court, upon a motion, by the defendants, for a new trial. The facts material to the point decided are these. The proprietors of the city of Cincinnati, at the time of originally laying out the grounds for a town, set apart the ground in controversy for a public use, designating the lots, on the map, with red ink, and indorsing a note in these words: "*The town lots given for public uses are numbered and painted with red ink.*" The first settlers planted their first church on a part of these grounds, and continued to occupy them from that period, 1790, to the commencement of this suit. As early as 1807, the First Presbyterian Church was incorporated, and from that time exercised exclusive ownership over the grounds in respect to the grave-yard, and other appurtenances. A great deal of other matter was involved in the litigation, which does not affect the decision *of the [299 court. At the trial, the defendants claimed the protection of the statute of limitations. But the court instructed the jury that the statute did not run against the claim of a town or city to property dedicated for public uses. The error of this instruction was one ground alleged for a new trial.

FOX, for the defendant:

I insist the court erred in charging the jury that the statute of limitations was no bar, although an uninterrupted adverse possession of the premises should be proved for more than twenty-one years.

It is not pretended that an individual would not be barred by the like adverse possession, but it is contended that the public,

that is, the city of Cincinnati, is not to be affected by the statute of limitations, because she is a sort of sovereign so far as her sphere of operations extends. I admit that statutes of limitations do not bind the sovereign power of a country, unless express provision is made therefor. But I find no case, nor do I believe a case is to be found, where any less a portion than the sovereignty of the whole state has been held exempt from the full operation of the statute. Let us look at the principle on which the exception rests. It is said in some of the books to rest on the supposition that the sovereign is too busy or too much occupied to pay particular attention to his rights, as an individual can. 1 Black. Com. 247. In other cases, it is said the exemption is founded upon public policy, that no negligence or laches can be imputed to the government or sovereignty of the country. 2 Mason, 314. Now the principle, when once admitted, must and does apply to all actions, real and personal; and if the city of Cincinnati can not be affected by the statute of limitations in an action of ejectment, she is not barred in any action of debt or assumpsit.

Again, if the city of Cincinnati is not to be affected by the statute, because a portion of the sovereign power is delegated to her in her corporate capacity, the counties and the townships, and all the other subdivisions of delegated power are not embraced. Again, in this very case, we have two portions of the sovereign power delegated. The city claim a portion of the sovereign power, and so does the county; they are both claiming the right of possession to the same identical piece of land. Here we see the sovereign power is divided, and the separate portions are contending against each other—one part of the sovereignty suing the 300] *other part. Can a case be found like this, in which a statute has been held not to apply? This exemption, on the part of the sovereign in monarchical countries, is generally admitted to be an attribute of sovereignty. Angell on Lim. 369; 18 Johns. 229; 5 Bac. Abr. 551–562.

It is an attribute of sovereignty, also, to be totally exempt from suits; but surely the city does not claim that she can not be sued. In the case of Paine v. Commissioners of Portage County, the defendants claimed the benefit of this attribute of sovereignty, and contended that the county could not be sued; but the court, consisting of Judges Lane and Wright, say, "their claim of exemption, on account of their sovereign character, can not be recognized.

They are but a corporation, performing certain public functions; not *lords paramount or sovereign.*" Wright, 417.

But I have said I could find no case where any exemption from the operation of the statute has been sustained, unless the king or state, in other words, the *whole* sovereign power, was the plaintiff. If such cases can be found, I presume the plaintiff's counsel will produce them. On the other hand, I do find cases somewhat analogous, in which it has been held that the maxim "*nullum tempus*," etc., is not applicable to a claim like this.

The lord proprietary of Maryland, for instance, can not shield himself under this maxim, nor can a bishop. 2 Harris & McHenry, 132–138. *Nor can the king confer his privilege.* Ib.

A corporation can not shield itself under the maxim, for a corporation may be disseized, and may become a disseizor. Angell on Cor. 103, 308, 310; 4 Serg. and Rawle, 317.

If the city is a mere corporation, like unto the counties of our state, it would appear to me these authorities are conclusive.

Why should not the city of Cincinnati be affected by the statute of limitations in an action of ejectment, as well as in an action of debt or assumpsit? Why should not time heal up and cure defective titles where the city of Cincinnati sets up a claim, as well as where one of her citizens asserts title.

I can perceive no great reason of public policy calling for the exemption of the city of Cincinnati from the operation of the statute. If the object of the statute is to give repose to the community, why should this city be permitted to interrupt that repose? This church, and those claiming under it, have been in *the peaceable and uninterrupted possession of this prop- [301 erty for forty-seven years. The town, as early as 1804, began to assert her rights as to public property. The claim to the common was litigated with Williams in that year. Is it not strange that at that time this claim should have been permitted to rest? I do consider, and always have considered the statute of limitations as a complete bar to the claims set up by the city. Whether we consider the statute as intended to dispense with the production of evidence which has been lost, or whether the lapse of time is considered as conclusive evidence of an abandonment of claim, the reasons for its application are, if possible, much stronger than in ordinary cases. If it is true, as Judge Burnet supposes, and as he was told, that the old inhabitants had agreed that the south

half of the block should be occupied by the Presbyterians for a church and burial ground, and that such agreement would operate as a bar to recovery, as this court instructed the jury, why does not the statute operate? Why not let the statute operate, as well as to presume a grant?

Again, it is well settled that the non-use of a highway for twenty years affords a presumption of a release or surrender. If a presumption of a surrender can be made against the public in case of a highway, why not in this case?

HAMMOND and V. WORTHINGTON, for the plaintiff:

The question of the statute of limitations remains to be considered. No authority or precedent, exactly in point, is found. The decision must therefore now be made upon principle and analogy.

The original common law doctrine rests on the legal maxim, "*nullum tempus occurrit regi*"—time does not obstruct the rights of the government. The true principle would seem to be this: the neglect of the public functionaries shall not take away the public rights. And the point of good policy, in this maxim, is, the discouragement of individual cupidity in making efforts to prey upon public property. The case before us presents a salutary admonition of the value of this policy.

It is argued that this privilege appertains only to absolute sovereignty. It has been held applicable to both the government of the United States and to the government of the states. Neither are absolute sovereignties. The entire sovereign power is divided between them. Both have a portion of political power, of a legislative, judicial, and executive character. With all these, to a 302] *certain extent, town corporations are invested. They create offenses, levy taxes, impose duties in their legislative character. A nd all these they enforce in their judicial and executive character. They bear a much stronger analogy to the state governments, in our divisions of powers, than to the boards of commissioners, or to a lord proprietor, or to a bishop under the ancient regime.

The convenience of repose is applicable to all cases where the government seeks to assert rights against individuals charged with usurping those rights. The arguments thence derived, by the defendants' counsel, go to the whole doctrine of exception as strongly as to the case of a town corporation.

The statute of limitations is a fair defense where it is strictly applicable, but before it can avail, a case must be brought fully and clearly within its provisions.

The first available statute, in Ohio, was enacted January, 1804. 1 Chase, 393. The law of 1795, even if of obligation, did not embrace the action of ejectment. This law of 1804 provides for ejectments in section 2, and employs this phraseology: "*No person or persons shall hereafter sue, have, or maintain any writ of ejectment*," etc. The act of January 25, 1810 (1 Chase, 655), uses the same terms in respect to ejectments. And such were the statutory provisions until the act of February 25, 1824. 2 Chase, 1403. This latter act is differently worded. It runs thus: "All actions hereinafter mentioned shall be commenced within the several times hereinafter limited after the cause of such action shall have accrued, and not after: first, actions of ejectment," etc. Can the statutes of 1804 or 1810 be construed to embrace the case of the city? Was the city *a person*, within the meaning of the terms employed? Our judgment would be that the case of the city is not embraced, even if a more general phraseology would embrace it. There was, then, no statute to affect the rights of the city until 1824, and the period of that act has not run.

Again, in a legal point of view, was it proper to consider the church a disseizor, under all the circumstances of the case, until the transactions of 1821, when she made private sales, in perpetuity, and disinterred the dead?

J. C. WRIGHT, on the same side:

1. As to the statute of limitations. Against *the public*, lapse *of time works no destruction of right. That, I suppose, [303 is beyond dispute. But it is claimed that the city is a mere corporation, subject, as natural persons, to the operation of the statute of limitations. Even if the court should hold this true, in respect of absolute rights in corporations, we think the case in hearing not within its principle. In cases where the corporation has absolute property, with complete power to use and alienate, it may be true that the right is subject to the same rules as affect and control the rights of natural persons. But where the right of the corporation is merely supervisory and preservative, without the power to convey away, change, or alienate, *the beneficial use* being in the *whole public*, the statute will not affect the right. The neglect of the public officer, who is only clothed with author-

ity to preserve the public use, will not work a forfeiture of the right in his case. He can not directly convey or dispose of the right; neither can he indirectly, by mere neglect or omission, pass away or destroy the estate. The city, in this case, does not own the *fee* of this land; it is not the owner of the estate; it has the right to possess, control, and secure the public in the free use and enjoyment of it.

2. It is claimed that the use by the church is in accordance with the dedication, and conclusive of the design of it. Suppose it should be held that the mere occupation of a portion of this ground by a church is a use consistent with the dedication, that only covers the ground so used, as to which the verdict is for the defendants, with a mere right of ingress and egress. This is no ground for disturbing the verdict. A public square in a town may possibly be used as the site of a public church, school, or market-house. The right so to use does not necessarily include the power of converting the property so used. On the contrary, such occupant is precluded from any step tending to the destruction of the right under which he enjoys the use. Like the tenant, he is required first to surrender the possession he received, before he can question the right of his landlord.

No length of time, connected with such mere use, can change the relation of the parties to the subject, or enable the occupant of the right of another, by mere volition, to become an occupant in his own right to the exclusion of the person under whom he entered. Suppose the county to have erected a court-house in the street of a town, and, without objection, to have used the house for half a century, until it became decayed and useless, or it is destroyed by accident, or it is removed to promote the convenience
304] *of the public, would such use give the county a title to the fee, and right to dispose of the ground so used as private property? No one can pretend so. In the case of the town of Gallipolis, this court decided that such claim could not be sustained, even when the legislature of the state had stepped in to aid them.

STORER, in reply, for the defendants:

The argument we have already presented, on the statute of limitations, we believed at the time it was made, furnished a full answer to the plaintiff's claim, and all the reflection we have since given to the subject has strengthened our conviction.

We assume, that the rule of "*nullum tempus*," as relied on by
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the plaintiffs, is resolved at last into a question of prerogative, and can therefore attach alone to the sovereign power of the country. And it is no useless inquiry in the application of the principle, to ascertain why it is that prerogative is thus held to be unaffected by the lapse of time; to say nothing of the disposition to limit the exercise of this attribute in all constitutional governments, or of the disastrous affects which have followed its application to the monarch as well as the people, it is sufficient for our purpose to exhibit the ground upon which it is claimed.

Mr. Gwillim, in his notes to Bacon's Abridgment, title Prerogative, vol. 5, page 489, defines the power to be "the special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity." Hence he is the universal occupant, as all property is presumed to have been originally in the crown; wherefore all derelicts and escheats, the right of dominion in all seas and great rivers, ports and havens, appertain to him. Being thus the superior power of the state, "he is presumed from the dignity of his office and person to be incapable of doing wrong, and even where an injury is done by any of his officers, he is under the happy inability of doing wrong, because in his political capacity, he acts by those whose powers are limited by law." 5 Bac. 550. So where the king's right and that of the subject meet at one and the same time, the king's shall be preferred, as the rule is "*detur digniori.*" Wooodward *v.* Fox, 2 Vent. 268, ed. 1726; the case of the Abbott of Strata Mercella, 6 Co. 24.

On this prerogative right, it is held, that the king is not bound by acts of parliament, except in those cases to which we have referred in our former argument.

*While, therefore, "*vigilantibus et non dormientibus jura* [305 *subveniant*" is a rule for the subject, "*nullum tempus occurrit regi*" is the king's plea, for there is no reason that the negligence of his officers, or their compact or combination with the adverse party, should cause him to suffer. Adm'rs Sheffield *v.* Radcliffe, Hobart, 347. It is also said his interests are certain and permanent, and no laches can be therefore imputed to him; hence there can be no *occupant* against the king, Co. Lit. 41, 46; nor yet a *tenant at sufferance*, nor can *he be disseized.* 5 Bac. 563.

Thus far the origin and extent of the principle; but the principle itself, as we have heretofore remarked, has from time to time

been limited by statute, and prescription is now pleadable against the crown, by Sir George Sackville's act of 9 Geo. 3, c. 16, and statute 32 Geo. 3, c. 58.

While, therefore, the king thus protected may sue in any form of action the subject, he is liable to no process in his public capacity; the remedy of the subject is not by suit, but by petition to the crown or to parliament, as the circumstances of the case may indicate.

It is believed that in England no case can be found where the grant of a charter to a municipal corporation by the king, or the claim of a charter by prescription, has ever been supposed to attach to either body the attribute of prerogative; on the contrary, the power is confined to the king alone, and can not be imparted to another. Such bodies are but legal entities, artificial in their organization, but really possessing the attributes of private persons; they are, therefore, liable to all legal process themselves, while they are at liberty to use it against others. They may hold land, and the privileges arising from it, and they may lose their right by *misuser* or *non-user;* they may disseize, and are, therefore, liable to ejectment or trespass for their acts. They may appropriate private property for public use; but if they refuse an equivalent, they are liable to the party injured at law, and can not compel him to ask for indemnity by petition to those who represent the corporation in an executive or legislative capacity.

The doctrine thus examined, as applicable to our jurisprudence, must be taken with much caution, and subject to all proper limitation, in a country where an effort to extend the rule would endanger its existence for such purposes that it might be just to retain it.

The principle, to a certain extent, has been acted upon in the 306] United *States, and we will again examine the cases where it has been adopted to prove not only how carefully it has been guarded by the courts, but to show more especially that it never was suffered to attach to the government in any other right than that of *sovereignty.*

In Staughton et al. *v.* Baker et al., the action was brought by the inhabitants of several towns in Massachusetts against several individuals to recover for certain alterations, which, by vote of those towns, had been directed to be made in a mill-dam owned

by the defendants. The reason of the alteration was, that the public right of fishing was interrupted by the obstruction, and it therefore became necessary to protect it. On the trial, it was urged that the defendants held title by grant in 1633, which was confirmed by the legislature in 1634, and therefore the plaintiffs could not recover. The court, however, decided that the grant was made subject to several implied limitations, one of which was to protect the rights of the public to the fishery, and that every owner of a mill-dam held it under the condition that such public right shall not be interrupted by his water privilege. And in conclusion the court further say, "That this limitation, being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it, for *no laches* can be *imputed* to the *government*, and against it no *time runs* so as to bar its rights." 4 Mass. 528.

Here the point is resolved into a question of sovereignty alone, as the government represents the same power in this case as the king would under similar circumstances in England, for the reasons already given. It can not be supposed that a grant can not be presumed even against a town or city from long possession; and yet if the rule we contend for is not the sound one, no estate can ever pass from a municipal corporation except by deed. But such is not the law, for Judge Parsons says, in the case just cited, page 528: "The ancient grants by towns are very loosely expressed, and when a fee was intended, words of inheritance were seldom used. When a *long possession* by the *grantee*, his heirs or assigns, has followed, the original grant has uniformly been considered as a grant of the fee."

The opinion of Judge Story in United States *v.* Hoar, 2 Mason, 314, is predicated upon the same ground which is assumed by Judge Parsons; "for," says he, "the prerogative right of the king, in relation to acts of limitation in England, is, in fact, nothing more than a reservation or exception introduced *for the public benefit, and is equally applicable to all gov- [307 ernments; and thus the general words of a statute ought not to include the *government*, or affect its rights, unless the construction be clear and indisputable upon the text of the act."

In Kemp *v.* Commonwealth, 1 H. & M. 84, the rule was confined to the State of Virginia, nor was it contended in argument that it could include any other representative or sovereignty.

So in Nimmo's Ex'rs *v.* Commonwealth, 4 H. & M. 71, Judge Roane cautiously observes, "I will merely say at present that within my observation the state is not in general, and from the nature of the case, can not be on an equal footing with private suitors in respect of diligence, attention, etc., however vigilant and faithful its officers may be, and that, therefore, the reason of this *pre-eminence* may be in some measure as applicable to the present *government* as to the *former*."

Judge Tilghman, in Johnston *v.* Irwin, 3 Serg. & Rawle, 291, follows up the same decision, "that the *commonwealth* could not be affected by acts of limitation."

And, the superior court of South Carolina, in Lessee of Allston *v.* Saunders, 1 Bay, 30, decide that "no time or length of possession runs against the *state*."

In New York, it is held that the *people* are not bound by the statute of limitations, unless specially included in its provisions. The People *v.* Gilbert, 18 Johns. 227.

In the case of the United States *v.* Kirkpatrick, 9 Wheat. 735, Judge Story adopts the principle, but limits it entirely to the *government*.

It will be seen with what caution our judicial tribunals have admitted the rule, how clearly they have defined it, how scrupulously they have guarded it. On the other hand, whenever the maxim alluded to has been asked to be applied in other cases, so far as we can find, the effort has always been unavailing. As in Kelly's Lessee *v.* Greenfield, 2 Har. & McH. 137, the point was made, whether the lord proprietor had the *same rights* with respect to Maryland, that the king had in England, in consequence of the charter to him by Charles I, as lord of the fee; but the court then decided, as early as 1785, "that the maxim '*nullum tempus occurrit regi*,' had never been applied, that we can find, to any but the king himself. And it is a *prerogative maxim*, which it must cease to be, whenever applicable to the subject." And again: "In 308] the hands of the crown it *is an inconvenient rule, but being placed there, it is still permitted to continue." It will be recollected that Lord Baltimore held directly from the crown, with all the rights, regalities, and prerogatives, which the Bishop of Denham enjoyed in that palatinate, to be held of the crown, as of Windsor Castle in the county of Berks, in free and common sockage, and not in capite; he was further authorized to make all

laws for the province, and held full executive power therein; yet he was denied the benefit of the principle, and placed on the same footing with the subject; and this when he embodied in his own person the property by grant, the whole territory, and the exclusive authority over it.

The same point is also decided in Russell *v.* Baker, 1 Har. & J. 91. So in Birch *v.* Alexander, 1 Wash. 37, where it is said by the court, "that either the *reason* of the rule extends, or the rule *itself* was ever applied to preserve the title of a *lord*, we do not admit." In the case before the court, a corporate right strictly is only involved, for the claim is to the square for the public use of the city, and it is to be ascertained whether the corporation who sue, possess a different character *quoad* this particular subject, than they would hold where the action in debt, case, or simple trespass, for if in one state of fact, they are concluded by the lapse of time, the rule we regard as equally applicable to every possible case. The criterion can not be the nature of the claim, but the character of the parties.

It has already been decided by the court, in the case of Paine *v.* Commissioners of Portage County, "that their claim of exemption on account of their sovereign character could not be recognized—they are but a corporation, performing certain public functions, not *lords, paramount* or *sovereign;*" and yet those defendants were, to every legal intent, in the same relation to the inhabitants of the county for whom they acted, as the present plaintiffs are to the people of Cincinnati. Wright, 417.

So in New York, in North Hempstead *v.* Hempstead, 2 Wend. 137, a claim was interposed by one township against the other for certain lands, which it was insisted belonged to both in common. It appeared there had been a division of the townships, and that part of the property in dispute was situated in each of the portions set off for the original township; it was proved also that each township had regulated the several portions of property within its limits, and had not interfered with that in the other. On a review of the case, Judge Savage decided that *the [309 portions of land in each township must be solely controlled by the body within whose limits it was situated, and that even if it was not thus to be regarded, and a right existed in the original town after the division, "that *that* right *was barred by lapse of*

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time." Here is a clear recognition of the principle, that municipal corporations are within the statute of limitations.

The argument, from inconvenience, never applies to corporate bodies, however extensive, where their existence depends upon an exertion of the sovereign power of the state. The neglect of municipal officers to perform their duties, and the consequent loss of the public revenue, or injury to the public interest, furnishes no excuse for the corporate body itself. That body was created with limited powers, but nevertheless to supervise and protect the public rights, and as those who *legislate*, or carry that *legislation* into *effect*, are elected by the public, they are, to all legal purposes, the agents of that public, who must be responsible for their acts, whether of commission or *omission*.

We have already said the power is confined to the state, as an incident of sovereignty merely, and can not be imparted to, or conferred upon a subordinate body. Whenever the corporation is created, and its franchises attach, it is the creature of the law which gave it birth, having the privilege of mere municipal government, for the purpose, so far as the health, safety, and general prosperity of the city are concerned, of legislative action. But the body corporate has no legal exemptions; it is bound for all its excess of authority, and may be sued in any form of action that the right sought to be redressed may require for its satisfaction. But the *government* is without the rule, and can not be subjected to suits, nor controlled in her acts, but by the interposition of the legislative power, which alone can limit her pretensions. We conclude, then, that the plea of the statute of limitations furnishes a complete answer to the claim of the plaintiffs.

Judge LANE delivered the opinion of the court:

The principle, that the sovereign power of a state is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This rule is sometimes of odious application; but it is adopted as incidental to sovereignty,† and necessary to preserve against neg-
310] ligence *or cupidity, those rights which the state has acquired or retained.

†By the new French code, this prerogative is expressly renounced. "L'Etat les Etablissements Publics, et les Communes, sont soumis aux memes prescriptions que les particuliers, et peuvent egalement les opposer." Code Civ., sec. 2227.

This immunity, however, seems to be an attribute of sovereignty only. No case is found in the books which exempts any other description of person, whether natural or artificial, from the operations of the laws; and none of the reasons for the exemption, apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. When the property is their own, the statute has been always held as binding; when their land, or franchises are of public character, *the public* which they represent, are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them. The rights of the corporation, therefore, seem well enough protected without invading the letter of the statute. And the very loose and indefinite character of some of these rights renders the protection of the law peculiarly necessary for the security of occupants.

New trial granted without costs.

WILLIAM GREENE ET AL. v. THE STATE, FOR THE USE OF LICKING COUNTY.

Contract for building a court-house in a workmanlike manner, recites that the county commissioners would superintend the work, such superintendence is not a matter precedent to the progress of the work. Nor does the appointment of a superintending agent, and the fact of his approbation, dispense with the obligation of the contract for executing the work.

ERROR to the common pleas of Licking. The defendant in error brought debt, in the common pleas, against Greene and six others. The declaration is in four counts, the third of which sets out the case fully as follows: That the defendants, on June 11, 1832, made their joint and several writing obligatory to the plaintiff, in the penal sum of $19,980, which was upon condition, reciting that said William Greene had, on that day, June 11, 1832, been declared by the commissioners of Licking county, contractor for the erection of a court-house and fire-proof offices, and that, on May 4, 1832, the commissioners adopted a plan therefor, which, with the drawings,

was thereby referred to; and that the commissioners agreed to superintend the erection of said court-house; and if the said Greene should commence, carry on, and complete the said building at the 311] several *times and in the manner specified in the condition annexed to said plan, and in all respects according to said drawings, to the acceptance of said commissioners and their successors, then the bond to be void. The plan referred to in the condition is next set out, by which it was provided that the building should be commenced in April, 1833, and be put under cover in November, 1833; the stone work to be built of certain dimensions and materials specified, for the foundation; the walls above ground to be of cut stone, and range work, etc.; all the materials to be approved by the county commissioners or their superintendent; payment to be made as follows: $1,000, August 1, 1832; $2,000, February 15, 1833, etc. The declaration then avers the payment of the $1,000 and $2,000 to Greene at the days stipulated, and general performance by the commissioners; general non-performance by Greene and special breaches, among others that the stone wall for the foundation was not built of proper materials, or in a workmanlike or proper manner, etc.

Greene, and all the other defendants, except Holmes, pleaded *non est factum*, and gave notice of special matter, upon which issue was taken. Holmes pleaded specially as follows, after obtaining oyer of the bond and condition: 1. That the commissioners did not superintend the erection of the court-house. 2. That Greene, in pursuance of said plan, did commence the said work on April 15, 1833, and after he had nearly completed the foundation and long before the time limited for finishing or putting the same under cover, the commissioners vacated his contract, and forbid him from further prosecuting the work. 3. That at the time the commissioners vacated the contract, Greene had been guilty of no default *for want of attention* or *competent knowledge* to carry on the work agreeably to contract, and all the materials and workmanship were approved by one James Bramble, who was appointed by said commissioners as superintendent and agent, expressly for the purpose of superintending the same. These pleas were specially demurred to.

At April term, 1826, the issue upon the plea and notices of Greene, and the other defendants, except Holmes, came before a jury, and verdict was given, finding the deed that of the defend-

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ant, and assessing damages at $3,555. During the trial, a bill of exceptions, in substance following, was tendered by the defendants and sealed by the court:

That on the trial it was proved by the defendants that James *Bramble, one of the commissioners, during the whole time [312 from the making to the vacation of the contract, was, prior to the giving the contract to Greene, appointed by the commissioners to superintend the building of the court-house and offices, but said appointment was subsequently erased from their journal by order of the commissioners; and that after Greene entered into his contract, and before the time for the commencement of his work, Bramble (who lived in town) was directed or verbally appointed by the other two commissioners to attend to the erection of the building, and to give the said two commissioners notice to meet whenever in his opinion the work was not properly progressing, and that Bramble did give the commissioners notice for that purpose, before the contract was rescinded. It was further proved by another witness for defendants, that he (the witness) was employed by Greene to put up the foundation, and to follow the directions of said Bramble in doing the same; that Bramble superintended the work until within a few days of the time the contract was vacated, and all the work was done in conformity with the advice and direction of Bramble, and Bramble approved the work as well as the materials. The commissioners vacated the contract before the foundation was completed, and the plaintiff claimed to recover in consequence alone of the badness of the work done on the foundation.

The court instructed the jury that inasmuch as no entry was made, on the record of said commissioners, of the appointment of Bramble as superintendent, no act of his could bind the county of Licking, or prejudice the right of the plaintiff to recover.

And further, that the condition in the bond providing for the superintendence of the commissioners, was not a condition precedent; but that the plaintiff, if the jury should believe that defendants had not complied with their contract, was entitled to a verdict, even if the jury should believe that the commissioners wholly neglected to superintend or to appoint a superintendent.

At May term, 1837, the court sustained the demurrers to Holmes' pleas, and assessed the plaintiff's damages to $3,789.63, the sum found by the jury on the issue with the other defendants, with

interest, and rendered judgment for $19,980, the penalty of the bond, with leave to take execution for the damages assessed, as the sum due in equity.

J. R. STANBERY, for the plaintiff in error, urged three grounds for reversing the judgment:

313] *1. That the superintendence of the work, by the commissioners, was a condition precedent, and their failure to superintend, a bar to the suit.

2. That the appointment of Bramble, even by parol, was binding upon the commissioners.

3. His approval of the work and materials, binds the county, and excuses a performance according to the terms of the condition. He cited 2 Kent's C. 232, 233; 7 Cranch, 299; 3 Wils. 530–540; 3 Chase's Stat. 1829.

DILLE and H. STANBERY, for the county, insisted:

1. That no agent or superintendent, appointed by the commissioners, could prejudice the public interest by the approval of insufficient work, not done according to the contract.

2. That no agent, with such power, had been appointed in fact, and no appointment of a superintendent *in the mode* shown in the bill of exceptions is valid.

3. That no authority to receive any other work than that stipulated for in the contract was ever, in fact, given to the agent, Bramble. They cited 29 Ohio L. 267, 281, 315; 4 Bing. 283; Bro. Ab. Corp. 56; 1 Vent. 47; 2 Lutw. 1497; Vin. Ab. Corp. K, 7, 21; 3 Leon. 107.

Judge GRIMKE delivered the opinion of the court:

We suppose the judgment on the demurrer to Holmes' pleas, by the court of common pleas, correct. The first plea avers that the commissioners did not superintend the erection of the building. The word *agree* in this clause of the condition of the bond, "the commissioners agree to superintend the erection of said courthouse," may have the effect, at first, of perplexing the judgment with regard to this part of the case. It may be supposed to create an express covenant between the parties, when, in reality, it is only a recital of something to be done for the benefit or advantage of the plaintiffs themselves. The second plea is defective for the very reason which is assigned, that no state of facts is averred

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by which the court can find that the vacation of the contract was unauthorized.

As to the third plea which sets up a defense that the materials and workmanship were approved by James Bramble, there is certainly great force in the objection that his appointment was only by parol. The case of the Bank of Columbia *v.* Patterson, *7 Cranch, 299, shows that the rule which required the sanc- [314 tion of the corporate seal to every act of a corporation has been very much relaxed; perhaps the case of King *v.* Briggs, 3 P. Wms. 419, proves that the rule never existed in the universality with which it has been stated. The exceptions to the rule are summed up by Chief Justice Best, in the East London Water Works *v.* Bailey, 4 Bing. 283. But it is unnecessary to decide that point. The mere appointment of a person to superintend the work, could not possibly dispense with the faithful execution of it, and compel the county to accept a building which was not erected in conformity with the agreement. If it did, what would be the meaning of the solemn covenant which the defendants entered into, securing the exact execution of the work, and even referring to the plan upon which the building was to be erected. All the substantial parts of the covenant would be superseded and put aside, by a matter which, even if it concerned the defendants, and not merely the plaintiff, was collateral to the principal object to be attained. If such were the consequence, we should have to look to the power of the county commissioners, and I apprehend we should find that they do not possess the authority to appoint an agent with the power which is claimed for him. They are mere agents of the public themselves, and the case would not form an exception to the general rule that delegated power can not itself be delegated. But suffice it to say, that there is nothing in the appointment of a mere superintendent which can dispense with the faithful performance of the contract.

These reasons dispose of the questions arising also on the bill of exceptions, and the judgment must be affirmed.

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315] *JAMES HAMPSON AND JOHN S. PARKINSON v. THE STATE OF OHIO.

A bill in chancery may be filed in court, under a special act of the legislature for taking an account upon a public contract; the accounts for work and labor may be investigated, and a decree rendered against the state for the amount found due.

THIS bill was filed in this court by the complainants in persuance of an act of the general assembly of the State of Ohio, entitled "an act to carry into effect the acts heretofore passed for the relief of James Hampson and John S. Parkinson," enacted on March 5, 1838. 36 Ohio L. L. 170. The case, so far as is necessary for the proper understanding of it, is stated in the opinion of the court.

It was argued by H. STANBERY and H. CURTIS, for complainants, and by VINTON for the state.

Opinion of the court, by Judge HITCHCOCK:

In September, 1826, the State of Ohio, by her agents, the canal commissioners, entered into contract with Hatheway and Scovil, for the excavation of section No. 1 of the deep cut of the Ohio canal, on the Licking summit, for which the said Hatheway and Scovil were to receive fifteen cents per cubic yard. A similar contract and upon the same terms was entered into with Osborn, Williams & Co., for the construction of section No. 2.

On October 31, 1826, the complainants contracted with the said Hatheway and Scovil, and the said Osborn, Williams & Co., to perform the greater part of said work, at and for the price of thirteen cents per cubic yard.

In pursuance of this contract, the complainants commenced operations, expended considerable sums of money in fixtures, etc., and carried on the work until September, 1828, when they abandoned it altogether.

The contracts proved unfavorable both to the original and subcontractors, and was not completed upon the terms originally agreed upon. These were abandoned and new contracts made, and for some of the last of the work the state paid for excavation as high as fifty cents per cubic yard.

Hampson and Parkinson, claiming that they had sustained loss

by their subcontracts, applied to the general assembly for relief. And on March 7, 1835, that body passed an act as follows:

"SEC. 1. Be it enacted by the general assembly of the State of Ohio, that the claim of James Hampson and John S. Parkinson against the State of Ohio, be, and the same is hereby *re- [316 ferred to the board of canal commissioners, who shall proceed to make or cause to be made, as soon as practicable, a full and impartial examination and estimate of the labor done in the construction of sections one and two of the Licking summit, by said Hampson and Parkinson; which estimate shall be made on fair and equitable principles, between the parties."

"SEC. 2. The canal commissioners are hereby authorized and directed to pay to the said Hampson and Parkinson out of the canal funds, as in other cases, the amount of such estimate and damages, found due said Hampson and Parkinson." 33 Ohio L. L. 309.

The decision of the board of canal commissoners under this law not being satisfactory to the complainants, they again memorialized the general assembly, which body, on March 14, 1836, passed the following joint resolution: "*Resolved, by the general assembly of the State of Ohio*, That the board of public works be, and they are hereby required, to reinvestigate the claim of James Hampson and John S. Parkinson, for compensation for work and labor done by them upon the Ohio canal. The investigation shall be made upon the principles prescribed in the act entitled an act for the relief of James Hampson and John S. Parkinson, passed February 7, 1835; said board shall have power to send for persons and papers, and it shall be their duty to carefully re-examine all the books, papers, reports, and testimonials relative to said claim. They shall ascertain the amount of labor done by the claimants and make a fair estimate of the value thereof; they shall deduct from said estimate the amount already paid the claimants, and strike the balance, if any, due in equity and justice to said Hampson and Parkinson. They shall add to said balance the interest rightfully due thereon, and certify the aggregate to the canal fund commissioners. Upon receiving such certificate, the canal fund commissioners are hereby authorized and required immediately to cause the amount so certified to be paid to said Hampson and Parkinson out of the canal fund. It shall be the duty of said board of public works to perform the duties enjoined upon them

by this resolution prior to the next session of the general assembly."

In pursuance of this resolution, the board of public works investigated the claim of the complainants, and made a report on the subject. With this report, however, the complainants were no better satisfied than with the decision of the canal commissioners. Another application for relief was made to the general 317] *assembly, and on March 5, 1838, an act was passed, entitled "an act to carry into effect the acts heretofore passed for the relief of James Hampson and John S. Parkinson." This act is in the following words:

"SEC. 1. Be it enacted, by the general assembly of the State of Ohio, That James Hampson and John S. Parkinson, of the county of Muskingum be, and they are hereby authorized to prefer, institute, or file in the Supreme Court of this state, at or to any term thereof, in the county of Franklin or in bank, an amicable suit in chancery against the State of Ohio, for such claim as they may have against the state, on account of labor done or the services performed on sections numbered *one* and *two*, on the deep cut of the Licking summit of the Ohio canal; which suit or action shall be set down for hearing at the first term of said court after its institution, unless for good cause shown it shall be continued; and shall be heard, considered, and decided as other causes are, by law or the rules of said court, heard and decided; and notice of the pendency of suit or action shall be given by a copy of the proper process being left with or served upon the governor of this state, at least sixty days before the sitting of said court in which said suit or action shall have been instituted; and the governor is hereby authorized to employ counsel to appear and attend to said suit or action on behalf of and for the State of Ohio.

"SEC. 2. That in determining said cause no objection shall be taken to the right of said Hampson and Parkinson to prosecute the same for the reason they were subcontractors; and in adjudicating the same, the court shall be governed by the principles contained in the act of March 7, 1835, entitled 'an act for the relief of Hampson and Parkinson,' and the joint resolution on the same subject, passed March 14, 1836, having reference to the several contracts heretofore made with contractors and subcontractors and the payments made and allowed under them, so

far as they may deem such reference necessary to subserve the ends of justice, according to the principle of said act and resolution.

"SEC. 3. On the final hearing of said suit, if a decree should be rendered in favor of the claimants, the amount of said decree of said court shall be certified by the clerk of said court, under the seal thereof, and upon presentation thereof to the auditor of state, it shall be his duty to give to said claimants, plaintiffs as aforesaid, an order upon the treasurer of state for the amount of such *final judgment and decree so entered and rendered [318 by the said court, with costs to be paid out of the canal fund of this state. But should the court be of opinion that the said Hampson and Parkinson have no valid claim, as set out by them in said suit or action, in law or equity, on account of performance of work done by them on said sections numbered *one* and *two*, in said deep cut, or the act and resolutions of the general assembly in relation thereto, the said court shall dismiss such suit or action at the costs of the said Hampson and Parkinson."

Under the provisions of this last-recited act the bill is presented, and an answer has been filed by the attorney for the state. The object of the complainants is to obtain compensation for work which they have done upon the canal, and for which they have not, as they claim, been fully paid. The case is one out of the ordinary jurisdiction of the court, and we are called upon to act rather as commissioners to liquidate a claim against the state, upon principles settled by the law conferring the power, than as a judicial tribunal deciding a case upon the ordinary principles of law and equity. If the case was presented to us for decision upon the known and established rules of law and equity, it is manifest that the complainants' bill must at once be dismissed.

There was no privity of contract between the State of Ohio and these complainants. The work by them performed was not, strictly speaking, performed for the State of Ohio. It was performed for the benefit of Hatheway and Scovil, and of Osborn, Williams & Co. And to these latter individuals the state was holden to make payment. And, according to the testimony in the case, to these individuals payment was actually made, and beyond the price stipulated in their contracts. If these contractors failed to pay over to the complainants, their subcontractors, it was not the fault of the state. The courts were open, and they might, at any time, have enforced their legal claims against those

who employed them. At least such would be the law where individuals were contracting parties. Should A. employ B. to build for him a house for a stipulated price, and should B. employ C. to do a part of the work at another stipulated price, will it be pretended that C., upon the failure of B. to make payment, could have his action against A. for the work and labor? And more especially after A. had made compensation to B., in full, according to his agreement. I am not aware that it makes any difference that the state is one of the contracting parties.

But we are not to consider this case upon the known principles 319] of law and equity alone, but upon those principles taken in connection with and measurably controlled by the special legislation before referred to. There is some difficulty in fully comprehending what was intended by this legislation. It seems to me, however, that the object was to make to the complainants a compensation for the balance due on the work performed by them, after deducting all payments made on that work. And in ascertaining this balance it was designed to have this work estimated, not at the contract price, but at its intrinsic value. In other words, they intended to place the complainant in the same situation with a plaintiff prosecuting a suit upon a *quantum meruit*. In the resolution of March 14, 1836, the board of public works are directed to "ascertain the amount of labor done by the claimants, and make a *fair estimate of the value thereof*," and then deduct the amount paid, etc.

If this be the proper construction of this legislation, and we think it is, then the court have first to ascertain the amount of labor performed by the complainants on the two sections of the canal referred to.

On this point, however, there is no difficulty. It is agreed that the work performed, consisted of excavation, and that the excavation on section numbered *one* amounted to 212,910 cubic yards; on No. 2, 171,000. In the whole, 389,910 cubic yards.

The next inquiry is as to the fair value of the work. Upon this point a number of depositions have been taken, and the witnesses differ very much in their estimates. The complainants, in one of their memorials to the legislature, and which they have introduced as evidence in this case, say that "they performed their work with a skill unsurpassed in the line of canal, and as energetically and economically as any other contractors, and *actually expended, for*

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the benefit of state, on said work, $41,439.33. It is reasonable to suppose that the complainants themselves would be better acquainted with the costs of the work than those less intimately connected with it, and probably this allegation is not far from the truth.

David Ruffner, one of the witnesses for complainants, says the excavation performed by the complainants was worth sixteen cents per yard. Estimating it at this price, we should find the whole work to be worth $61,425.60, or $19,931.67 more than it actually cost.

*David Shaw, another witness for complainants, says that [320 it was worth eighteen and three-fourth cents per yard. By this estimate the value of the work would amount to $71,983.12½, or $30,489.19½ more than its actual cost.

Anthony Butler, another of complainants' witnesses, says that it was worth twenty cents per cubic yard. This would make the whole work worth $76,782, or nearly one hundred per cent. more than its actual cost.

These estimates would give to canal contractors immense profits on their work—more, we believe, than what has been usual. And a comparison of the estimates of the value of the work, with the actual cost of that work, convinces us that these estimates are too high. It is right and proper that a reasonable profit should be made, but a profit of from fifty to one hundred per cent. is rather extravagant.

We next have the testimony of Micajah T. Williams, Alfred Kelley, and John Creed. These are witnesses of candor, and the two former, at least, are well acquainted with the value of this kind of work. They differ in their estimate from ten to thirteen cents per cubic yard, making the average about eleven and a half cents. It would, perhaps, be safe to take the estimate of these witnesses in establishing the rule of compensation. But inasmuch as Messrs. Kelly and Williams were the agents of the state in putting this work under contract, and in superintending its construction, it will, perhaps, be more satisfactory to all concerned to place their testimony out of the case.

On the whole, we incline to take the opinion of Joseph Ridgway, jr., as that by which we are governed in putting a value on this work. We do this because all concerned appear to put full confidence in his integrity and ability. Besides, he was well acquainted with the work as it progressed; and as an engineer, has

been accustomed to estimate the value of this description of work Mr. Ridgway says that taking into view the expense incurred by the complainants in their fixtures and arrangements, made with reference to the completion of the job, the excavation done by them on section No. 1, was worth thirteen cents per yard, and that on section No. 2, eleven cents.

The value of the work, according to the testimony of this witness, is as follows:

212,910 yards on section No. 1, at 13 cts. per yard,	$27,678 30
171,000 yards on section No. 2, at 11 cts. per yard,	18,810 00
Amounting in the whole to	$46,488 30

321] *Being an advance of $4,994.37 upon its actual cost.

This amount is to be reduced by all payments made by the state toward this particular work. Complainants admit that they have received $25,183.68, but deny that they have received anything beyond this, and claim the balance, after having deducted the amount thus received. On the other hand, it is claimed, on the part of the state, that more than $40,000 was paid to the original contractors for this work, and it is denied that the state could, in any manner, be held answerable for the faithful payment by these contractors to their subcontractors. It is, therefore, insisted that a credit should be allowed to the state equal in amount to what she has paid. This is an important question, so far as respects these complainants and the people of the state. But that we may properly settle it, let us, for a moment, lay the parties to this case out of view, and examine the principles applicable to the hypothetical case before stated. That case is, A. contracts with B. to build for him a house of specified dimensions, and for a specified price. B. contracts with C. to do the whole or a part of the work, likewise at a specified price, and at a price less than that which he himself is to receive from A. as the work progresses. A., from time to time, makes payments to B. according to his contract, and when the work is completed, pays him off in full. Afterward it is found, however, that B. has not fully paid C., who has done the work, or a part of it, and C. files his bill, or commences his action against A., claiming payment from him for his labor, on the ground that "the laborer is worthy of his hire," and that A. has been benefited by his (C.'s) labor. True, when he performed this labor, he did it, not for, or on, the credit of A. With him he had no con-

tract; with him he kept no account; his contract is with B., and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A., and is of some benefit to him, he insists that, although A. has once paid for this house, he shall pay for it again. What court would, for a moment, entertain such a claim? What lawyer would commence such a suit?

Still the case before the court is precisely the same in principle as this hypothetical case. The agents of the state had no contract with Hampson and Parkinson; they made no payments to them, they kept no accounts with them. And in what situation, I ask, would the state be placed in the attempt to prove the *amount [322 of payments made by Hatheway and Scovil, and by Osborn, Williams & Co. to Hampson and Parkinson? If called upon to do this, she would be called upon to do that, about which neither she nor her agents had or could, in the ordinary course of things, have any knowledge. I know that it is sometimes said, that it is beneath the dignity of a great state to resist claims brought against her upon principles like these, that is, the principles of law and equity! Such language may be addressed to a legislative body, to induce the allowance of a claim that is unfounded in law or equity, but ought not to be addressed to a judicial tribunal. In truth, there is not the least foundation in the ordinary principles of either law or equity, for the pretense of the complainants' counsel, that the state should not be credited to the extent of the payments made to the original contractors for this work. The injustice of such claim seems to have been manifest to the complainants themselves; for Hampson, in his memorial to the legislature, which induced the passage of the law authorizing the institution of this suit, says: "Your memorialist does not ask that the state shall pay a second time for any work which has been paid for, to them, or the original contractors. But he does ask the privilege of showing: 1. The amount of labor performed. 2. That this labor has not been paid for at its *fair* value, to them, or anybody else," etc.

This memorial is one of the documents submitted to the court by the complainants in this case; for what reason we know not, unless it be intended as a guide to direct us in the construction of the law.

But suppose the claim submitted by the counsel for complainants should be admitted to be correct, and the state should re-

ceive no credit beyond the amount which the complainants admit they have received from the original contractors, what would be the consequence? The state, then, would be compelled to pay a second time for this work?

It is probable that Hampson and Parkinson had laborers under them who performed this work, and to whom they were to pay stipulated prices, and it is possible that these laborers may not have been entirely paid. If such be the fact, and the principle insisted upon by the complainants' counsel be correct, these laborers have a claim, equally founded in justice, with that of Hampson and Parkinson, against the state for a compensation for the labor by them actually performed. And carrying the principle out, the state having once paid for the work to the contract-
323] ors, *and having paid for it again to the subcontractors, must in the end pay over again, and the third time to the manual operatives who actually performed the work. Such would be the practical operation of the system advocated by those who hold that it is "beneath the dignity of a great state" to require of those with whom it deals, that they should be bound by their contracts.

The ground assumed by the complainants' counsel in advocating the position that the complainants are entitled to compensation, exclusive of payments made to the original contractors, is not, however, based upon the supposition that such position is founded upon the abstract principles of law and equity, but that it is sustained by the special legislation having reference to this particular case. Before examining the subject in this point of view, it may not be improper to remark that it is hardly to be supposed that the legislature would pass an act so impolitic as well as unjust, as would be one which would compel the people whom they represent, to pay a second time for labor performed in constructing the internal improvements of the country, after they had once in good faith paid for the same work, and paid, too, to the persons entitled to receive payment. It must be remembered, too, that the complainants, in asking for this special legislation, admitted the propriety of the state's having a credit for the full amount which had been paid to the original contractors, and it can not be supposed that it was the intention of the legislature to give them anything over and above what they required.

Having made these remarks, let us examine this special legis-
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lation. The act of March 7, 1835, merely authorizes and requires the canal commissioners to make "a full and impartial examination and estimate of the labor done in the construction of sections *one* and *two* of the Licking summit," by Hampson and Parkinson, "on fair and equitable principles," between the "parties," and to pay to them the amount of such estimate which should be found due. Whether in making this estimate, reference was to be had to the contracts under which the work was done, is not prescribed. But inasmuch as the law was silent upon this subject, I suppose that the commissioners, in acting under it, must be controlled by those contracts.

Next comes the joint resolution of March 14, 1836. This required the board of public works to reinvestigate the claim of the complainants, upon the principles prescribed in the act above *referred to. They are directed to "ascertain the amount [324 of labor done by the claimants, and make a fair estimate of the value thereof." By this, I understand that the board of public works were required to ascertain the intrinsic value of the work, without reference to contract price. After having ascertained this value, they are required to "deduct from said estimate the amount already paid the *claimants*, and strike the balance." This clause would seem to favor the construction contended for by the complainants' counsel, and possibly, was there nothing further in this special legislation, we might so decide. To this balance, interest was to be added.

By the act of March 5, 1838, the duty previously required to be performed in the first instance by the canal commissioners, and in the second by the board of public works, is transferred to this court. And the court are required "in adjudicating the same" (that is the case instituted in pursuance of the act), to "be governed by the principles contained" in the before-recited act and resolution, "having reference to the several contracts heretofore made with the contractors and subcontractors, and the payments made and allowed under them, so far as they may deem such reference necessary to subserve the ends of justice, according to the principles of said act and resolution." In neither the previous act or resolution is any reference had "to the several contracts." But by this act the court are required, "if necessary to subserve the ends of justice," to have reference to these contracts, "and the payments made and allowed under them." No payments have

ceive no credit beyond the amount w[illegible]ainants, but payments they have received from the origin[illegible]rs under these contracts. the consequence? The state, t[illegible] subserved without having second time for this work? [illegible]ems to me, therefore, that it

It is probable that Hamp[illegible] legislature that these payments them who performed thi[illegible] value of the work. This was the stipulated prices, and [illegible] by Hampson, one of the complain- have been entirely p[illegible] was passed to meet that proposition. insisted upon by t[illegible] value of the work was $46,488.30. From borers have a c[illegible] amount paid by the agents of the state Hampson and T[illegible] with Hatheway and Scovil, and with Osborn, the labor by [illegible] same work. For the balance, together ple out, the [illegible] January 1, 1829, the complainants are en- 323] ors [illegible] must in [illegible] operat[illegible] prac[illegible] the [illegible] t[illegible]

*KELLY AND KILBORN v. MILLS, IMPLEADED WITH WILDMAN.

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Where a written contract is, in its terms, ambiguous and perplexed, mixing different stipulations so as to present niceties as to precedent undertakings, the court should endeavor to ascertain the real intention of the parties, and so interpret the writing as may best promote a just decision upon their rights.

COVENANT reserved in Huron. The defendant being in default for want of plea, a jury was impaneled to assess the damages, and upon the return of their verdict, the counsel for the defendants moved in arrest of judgment; the questions arising upon that motion were reserved for decision here. The state of the case upon which the decision of the court rests, is fully stated in the opinion of the judge.

F. PARISH and SAYLOR, for defendant:

Contended that contracts are to be construed in accordance with the *intention* of the parties, gathered from the structure and fair interpretation of the whole instrument. By this rule, the question whether the covenants are dependent or independent, is to be settled. 5 Ohio, 492; Wright's S. C. 474; 10 Johns. 203; 1 Wend. 228; 5 Wend. 496; 1 Term, 645; 6 Term, 668; 7 Term, 130; 1 Saund. 320, n. 4.

ECHER and CAMPBELL, for plaintiffs, submitted no ar-

OD delivered the opinion of the court:

riting on which the plaintiffs declare, is between Cahoon e first part, Kelly and Kilborn of the second part, and ldman and Mills of the third part. So much of it as it seems material to notice, recites that Cahoon had determined to build in Sandusky a mill, of stone, to be propelled by steam, of four stories in height, and sixty by forty feet on the ground. The plaintiffs covenanted to do the work; Cahoon to furnish certain portions of the materials, and to pay the plaintiffs in the manner expressed: one dollar for each perch of stone in the walls, without deduction for doors, windows, etc. The defendant and Wildman then covenanted as follows, viz:

"That to aid the said first and second parties in the work of erecting the walls of said stone mill, they will pay the plaintiffs for laying up said walls, at and after the rate or price before stated, in the manner and at the times following: $150 whenever and as soon as the walls of the lower story shall be completed; a like sum as soon as the second story shall be completed; a like *sum when the third story shall be completed; and a like [326 sum whenever or as soon as the fourth story shall be completed, including the gable ends and battlements."

It is then stipulated that such sum as Kelly, one of the plaintiffs, shall be owing the defendants upon a land contract (supposed about $150), shall be applied in part payment of said work; and the said Kilborn, the other plaintiff, shall take the same amount in a lot in the city of Sandusky, or in cash obligations at the election of the defendants. It was further stipulated, that those two last payments should be made, although such payment should curtail the other payments mentioned. And when the whole amount shall have been paid to said Kelly and Kilborn, at the rate of one dollar per perch, as aforesaid, it shall be in full of all their claims, unless damages have been sustained by the non-performance of their contract; and is an advancement made by said *third* party to said *first* party, in aid of his aforesaid undertaking. Then follows the covenant in these words:

"Said second party is to lay eight stone piers in the body of said building, as foundations for an equal number of posts, and to

be paid for in the same manner as the solid walls of said building." Upon the inquiry of damages the court instructed the jury that the covenants of the defendants were collateral to and independent of the covenants of Cahoon; and, in the language of the covenant, were intended as an advancement to Cahoon, to aid both parties, and secure the progress of the work; that the defendants had undertaken for the performance of Cahoon, and were liable for his non-performance to the same extent *he* would be if the suit were against him. The jury were further instructed to find the items of the damages found for the plaintiffs. The verdict assessed damages for the three following items:

1. For digging the foundation of the building and piers, $209.45.
2. For laying the foundation and piers, $620.
3. For the walls of the first and second stories, $700.40.

Total damages, $1,529.85.

Upon a motion in arrest, the objections to the judgment must appear on the record. In this case, if the declaration fail to deduce from the covenants set forth a legal liability to respond in damages, or does not show a legal right in the plaintiffs to recover, the motion in arrest will prevail. The contract is very unskill-
327] fully *drawn, and owing to the numerous contradictions and equivocal expressions in it, there is *certainly* some difficulty in comprehending its legal import, or the *intention* of the parties to it. It is our duty to search for the meaning and intention of these parties from the whole instrument taken together.

As the case is presented, it appears to us the only question is, to what extent are the defendants liable on their covenants? In one place they agree to pay at the rate of one dollar a perch for laying up the walls of the mill, in the same manner stipulated by Cahoon. This would render them liable to the whole sum found by the jury. In another place, it is stated that when payments shall be made to the plaintiffs at the rate of one dollar per perch, etc., it will be in full of all their claims, unless damages shall be sustained by the non-performance. Take this part by itself, and the defendants are not only liable for the amount found by the jury, but for additional damages for Cahoon's non-performance.

Again, it is stated that the defendants will lift any orders for the payment of the bond which the plaintiffs might give upon the stores in Sandusky, without any limit as to the amount. In one

sentence, the defendant's undertaking is stated to be an advancement to Cahoon; in another, to aid both him and the plaintiffs. Scanning the whole agreement, we will endeavor to extract the intention of the parties. There seems but one sensible clause in the first four pages of the contract, and from this we gather, as near as we can, the liabilities of the defendants. By this the defendants covenant to pay $150 when each of the four stories of the mill are completed, in all $600, to be satisfied in part by the sum due defendants by Kelly on a land contract, and by like amount to Kilborn in a city lot or cash obligations, at the option of defendants, though such payment may curtail the particular payments stipulated. We think this clause manifests the intention of the parties to limit the liabilities of the defendants to $600 in all. When, therefore, the defendants covenanted to pay for the work at a dollar a perch, we think the parties intended they should so pay only to the amount of $600, for which they were security for Cahoon, and for any sum beyond that the plaintiffs should look to him for remuneration. If we are correct in this construction, the verdict finds damages to the amount of $929.85 beyond the liability of the defendants, and can not, therefore, be sustained.

The cause is remanded to the county for a *venire de novo*.

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*CATHARINE SUMNER *v.* JAMES HAMPSON AND THE HEIRS OF JOHN WILLIAMSON, DECEASED. [328

Where partners manifest an intention to hold land as partnership stock, and sell it as such, dower can not be claimed in such lands to the prejudice of partnership creditors.

THIS case was adjourned from the county of Fairfield, and came before the court upon demurrer to the complainant's bill, which sets forth that complainant was the wife of John Williamson, who died intestate; that after the marriage of petitioner to said Williamson, and as early as the year 1805, he entered into partnership with the defendant, Hampson, as builders, master-carpenters, and general speculators, which was continued to the death of William-

son, which happened in the year 1820; that Williamson and Hampson had no written articles of partnership; that in the course of the business of said firm, and before the death of Williamson, they acquired the legal title to out-lots east of Lancaster, Nos. 7, 8, 9, 12, and 13, with partnership funds, which they continued to hold at the death of John Williamson.

That the firm, at the death of Williamson, was largely indebted; that the accounts have not, in fact, ever been settled, and that the entire proceeds of the above-described lots, when sold, will be necessary to pay and satisfy debts yet due from the firm—the personal effects belonging to the same having been applied toward the payment of the debts. Prayer that dower may be decreed to be assigned to complainant out of the above described property. The heirs of John Williamson and the surviving partner, Hampson, are made defendants, and unite in filing a general demurrer to the bill and joinder therein.

The question thus raised is this: Is the widow of a deceased partner entitled to dower in that part of the partnership lands which are *necessary* for the payment of *partnership debts?*

BRAZEE, for demurrant:

The act in force at the death of Williamson in relation to dower provides, "That the widow of any person dying intestate or otherwise shall be endowed of one full and equal third part of all the lands, tenements, or other real estate of which her husband was seized *as an estate of inheritance*, at any time during the coverture." 1 Chase's Ohio L. 472. This provision in the statute of 1805 is, in substance, the same as that in the act of 1824, which is still in force.

In the case of Greene *v.* Greene, 1 Ohio, 535, which was decided
329] fourteen years ago, this court determined that the *widow of a deceased partner is not entitled to dower, in lands purchased and paid for out of the partnership funds, under articles stipulating for the sale of the whole partnership property for the payment of debts, and used exclusively for carrying on their trade, the partnership being insolvent, and the deceased partner greatly in debt to the firm. In pronouncing the opinion in this case, the court recognize and affirm some of the leading principles of law governing this subject—and say that "her (the widow's) estate is but a part of his (the husband's), is derived from him, and must be subject to all incumbrances existing against it at the time of the

marriage, or the acquisition by the husband. The husband can by no act of his destroy or affect her right of dower where it has once attached, but it only attaches where he has a real *beneficial interest* in the lands of which dower is claimed. Upon this principle it has been held, that the wife of a mere trustee was not entitled to dower in the trust estate, although the husband was at law seized of an estate of inheritance. A mere technical seizin of the husband, without any beneficial interest in the estate, will not entitle the wife to dower, as where lands descend to the husband, and are afterward, by virtue of the provisions of the statute, sold by the administrator of the ancestor, to pay the debts due by such deceased; here the husband is seized of a legal estate of inheritance, cast on him by operation of law, but subject to the payment of the debts of his ancestor, and its being sold for that purpose shows that the husband never had a beneficial interest therein. So, where the husband is only seized for an instant. Coke Lit. 31. Where lands are mortgaged to the husband, and the mortgage money is afterward paid, the husband was seized during coverture of a legal estate of inheritance, and yet the wife can not have dower in the lands so mortgaged. Also, where lands are purchased by the husband, and mortgaged at the same time to the vendor for the purchase money, it has been held that the mortgage is paramount to the claim for dower. 15 Johns. 461; 4 Mass. 566.

Chancellor Kent, in the edition of his Commentaries, published in 1836, in citing the above case, says (note A, vol. 4, p. 50), "In that case, the subject is ably discussed; and the whole volume is evidence of a very correct and enlightened administration of justice, in equity as well as in law."

All applications for dower, under our law, are addressed to the equitable side of the court—"and the right of dower is regulated *in equity by the nature of the property in the equity view [330 of it." 4 Kent, 49.

In the case of Greene v. Greene, the court further say, "It has been too repeatedly determined to be now questioned, that the separate estate of a partner consists of that part of the partnership effects which shall remain after the debts of the partnership and the demands of the partner qua partner are satisfied, ex parte King, 17 Ves. 115; Taylor v. Fields, 4 Ves. 396; Nicoll v. Mumford 4 Johns. Ch. 522; and that interest or surplus only is liable

to the separate creditors of each partner claiming either by assignment or under execution. Church *v.* Knox, 2 Day, 514; 6 Mass. 242, 271; 11 Ib. 249, 472; 2 Johns. 280. The interest which William Greene, the husband of the complainant, had at the moment of his death in the partnership effects, was the surplus, after payment of the partnership debts, and the balance due his partners. . . . If this estate is to be considered *in equity as personal property*, and the court have no hesitation in saying it must be so considered as between the partners and their creditors, he had no substantial interest at the time of his death which would go to his representatives, or could be taken by his separate creditors." And to show that the circumstance of the *agreement* did not influence this view of the subject, the court add, "If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the husband; and the wife, when there is such an agreement, unless it were executed after her right attached, would be bound thereby so as to exclude her right of dower."

It is claimed, that inasmuch as the bill in the case at bar shows that there were no *written articles* of partnership, and does not show that there was an *agreement* between the partners, that the lands acquired by the firm should be sold for the payment of the debts of the firm; that this case is so far distinguishable from the case of Greene *v.* Greene, in principle, as to entitle the complainant to dower. On the other hand, we claim, that the *principles* settled in the case of Greene *v.* Greene, as well as the settled law as to the equitable character of the property in controversy, in England and in this country, make no difference, as to the rights of the complainant, whether there was or was not such an *agreement*. That the law itself in the absence of such agreement implies it, or holds the property thus acquired with partnership 331] funds responsible for the payment of *the partnership debts, to the exclusion of every other claim or demand upon it—arising from the partners.

The first case that I have found, where the effect of such an agreement was discussed, is that of Thornton *v.* Dixon, 3 Br. Ch. 198, which was decided in 1791. The rights of *creditors* were not involved in that determination. The case arose between Thornton, the administrator and husband of Ann, who claimed as survivor his wife's moiety in the property in controversy, and Jona-

than, the heir of Ann and Barbary Dixon, their mother. The only question at the hearing, between these parties was as to the equitable quality of the property in controversy.

Lord Thurlow, at the first hearing, said, "He had always understood, that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund; and that consequently, Broadmoor and Meerbeck (the property in controversy) must be considered as personal estate, and distributed as such. And that as the surviving partners were not bound to admit the representatives of a deceased partner, after the expiration of the term to the partnership, the concern must be sold and divided, and distributed as personalty among the claimants, according to the rules of law." The cause stood over; and upon its coming on again, "The chancellor thought, that had the agreement been that the mills should be valued and sold (not for the payment of the debts of the firm), it would have converted them into personalty of the partnership; but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that after the dissolution, the property would result according to its respective nature—the real as real, the personal as personal estate." No previous case is cited by Lord Thurlow in this case for either opinion. This being a determination of the lord chancellor himself, it is to be expected that it would influence the subsequent determinations of inferior judges, and that the result of this opinion would find its way into the elementary books, written or published soon afterward. Consequently we find, in the case of Bell *v.* Phyn, 7 Ves. 453, which was a controversy about a plantation in the island of Grenada, purchased with partnership funds, between the heir and the residuary legatee, that the master of the rolls (after having mentioned that there was no occasion to call for this property for any of the purposes of the partnership), and after doubting *whether the Grenada es- [332 tate, upon the case made, could be considered partnership property at the death of Phyn, says, that even if it can, "upon the authority of the case before Lord Thurlow, I am obliged to decide in favor of the heir." In the subsequent case of Balmaine *v.* Shore, 9 Ves. 500, decided in 1804, where the question as to dower was not made, and where the rights of creditors of the firm were not involved, and where the property in controversy was shown to have been purchased, not out of the partnership effects, but out

of the separate property of each partner," the master of the rolls, speaking of the equitable character of the property or whether it became personal, says, "After the case of Thomas *v.* Dixon, reported in Brown by the name of Thornton *v.* Dixon, that is not a question that admits of argument; for this is rather a stronger case for the heir than that."

There may be, and probably are, other English cases decided upon the authority of these cases, about the same time; but it is not deemed necessary to notice them—for if it be shown that the authority of the *leading* cases are overruled, nothing need be said about the others.

In a note to the case of Thornton *v.* Dixon, in the London edition of 1819, it is said, "The doctrine upon this subject has been altered by a very recent decision in the case of Townsend and others, executors of W. McIntosh *v.* Deveynes and J. McIntosh, which is reported in the appendix to Mr. Montague's valuable work on partnership, vol. 1, p. 97. There is also a dictum of Lord Eldon, in the case of Selkrig *v.* Davies, 2 Dows' P. C. 242, in which his lordship is represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. The question will probably soon be brought forward again to receive a more solemn adjudication; in the meantime it is well understood to be the opinion of many gentlemen of the first professional eminence, that where real estate has been purchased with partnership property, for the use of the partnership, it becomes personal property, not only as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner. The cases of Bell *v.* Phyn, 7 Ves. 453; Balmain *v.* Shore, 9 Ves. 500, which were in a great measure determined upon the authority of the present case, may now therefore be considered as entirely overruled.

333] *The circumstances of the case in Montague, which was decided by Lord Chancellor Eldon, in 1810, and which is said to be nowhere else reported, ought to be more particularly stated. The controversy arose between the executors of W. McIntosh and J. McIntosh, his heir at law. The deceased McIntosh had been a partner in the paper-making business with three other persons, from 1801 to the time of his death. During the continuance of the partnership, the firm purchased certain freehold and copyhold

lands in the county of Sussex, upon which the business of the partnership was carried on up to the death of McIntosh, and they paid for the same out of partnership effects. It appears also that the will of McIntosh was not so executed as to pass *real estate.* It also appears from the master's report that there was no agreement between the partners, or by the said McIntosh, binding upon his heir, for the sale of his interest as partner in the aforesaid lands. In this state of case, the executors of McIntosh sold to Devaynes, one of the surviving partners, the interest of McIntosh's estate in the concern, including his interest in the lands, for the sum of £4,700. The master, to whom the cause was referred, was specially instructed to inquire and report, how much (if any) of the said sum of £4,700 paid to the executors of W. McIntosh, for the purchase aforesaid, arose from such part or parts of the premises as was or were personal estate. The master reported that the proportion of that sum, arising from said freehold and copyhold premises, amounted to £3,400, and that the residue thereof of £1,300 arose from such part of the premises as was personal estate. The executors, being dissatisfied with the report, excepted thereto, for the reason that he ought to have reported that the whole of said sum of £4,700 arose from personal estate. This exception was fully argued, and upon the argument *was allowed* by the lord chancellor.

Although the opinion of the court in this case is not found in print, it is fair to presume, considering the nature and importance of the question, and the learning of the chancellor, that all the previous cases were reviewed and examined, and the doctrine of the decision established upon principle; if so, this case has overruled that of Thornton *v.* Dixon, and the subsequent cases decided upon the authority of that case, and restored the law in England, to what Lord Thurlow, in the first opinion he pronounced, declared he had *always* understood it to be. This is the strongest case against the defendants, in its circumstances *which can be [334 put. Neither the rights of the partners as such, nor of creditors (which are always favored in law), were in any way involved. The question was solely between the personal representative and heir.

In the previous case of Ripley *v.* Waterworth, 7 Vesey, 425, the court determined that an estate of freehold, held for the purposes of the partnership, shall in equity descend as personal estate, if it

appear, by *express agreement*, to have been the intention of the partners that it should be converted into personalty.

Mr. Collyer, in his late work on partnership (72), in reference to this case, says, *it paved the way* for the *modern* doctrine on this subject. He further says, at page 74, "It is to be observed that the case of Ripley *v.* Waterworth does not carry the doctrine to its *full extent*." That "the question, however, seems to be perfectly settled by the case of Townsend *v.* Devaynes, though it is to be regretted that Lord Eldon's judgment is not included in the report of that case." "Upon the whole," adds Collyer, after a review of most of the English cases, "therefore, the opinion seems to be that although the legal estate in freehold property, purchased by partners, for the purposes of their trade, will go in the ordinary course of descent, yet *the equitable interest* in such property will be held to be part of the partnership stock, and distributable as personal estate," Ib. 76; he having previously stated, at page 70, that there is "no satisfactory reason why a *court of equity* should extend the laws of descent to real property belonging to a partnership."

In the case of Feredy *v.* Wightwick, 5 Cond. Eng. Ch. 383, decided in 1829, the master of the rolls states the law in relation to partnership property thus: "In the year 1799 a lease was taken of certain mines, and a lease was also taken of the surface; the mines and surface were used with a community of expense and profit. A mining concern is to some purposes a trading concern; it is not so to all purposes; it has not therefore all the incidents of a trading concern. It is a principle that *all property*, whether real or personal, is subject to a sale on a dissolution of the partnership. This is a property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership."

In the case of Phillips *v.* Phillips, 7 Cond. Eng. Ch. 215, decided as late as July, 1832, where the controversy arose 335] *between the real and personal representative, the master of the rolls again states the doctrine on this subject thus, "With respect to the second question, whether the freehold and copyhold property, purchased with the partnership capital, and conveyed to the two partners and their heirs, for the purposes of the partnership trade, is to be considered as personal estate *only* for the

payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of a deceased partner, I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, *to every intent*, the quality of personal estate; and in the case of Feredy *v.* Wightwick, 1 Rus. & Myl. 45, I had no intention to confine the principle to the payment of the partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion; the case of Townsend *v.* Devaynes is a clear decision to that effect; and general convenience requires that this principle should be adhered to."

In Smith's Mercantile Law, 17 Law Lib. 86, a work published in England within the last two years, the author thus states the rule: "In the earlier cases on this subject, it appears to have been thought that freehold lands, bought with the money and used for the purposes of the firm, ought not to be considered in equity as converted into personal property; and therefore, that at the death of one of the partners, as equity allows no *jus accrescendi* among merchants, even in lands, the share of the deceased would descend to his heir, whose right thereto might be enforced in equity. This doctrine, however, now seems more than questionable, and the modern rule is conceived to be, that all property of what nature soever, bought with the cash and for the purposes of a trading partnership concern, must in equity be looked upon as personal; and, that as there can be no survivorship in it, a partner's share will, on his death, pass to his personal representative, for whose benefit the surviving partners, or their trustees, will hold it; since in this the *jus accrescendi* takes place at law. If, indeed, the partners have *stipulated* that freehold lands purchased by them shall not be subject to the application of this equitable doctrine, but shall follow the rules respecting property of that description, or if they act so that such a stipulation may be reasonally inferred from their *conduct, in such a case the rule of equity yields [336 to the ordinary course of law coupled with the intention of the parties, for *quilibet potest renunciare juri pro se introducto*."

I will now refer the court to some American authorities bearing on this subject.

In the case of the Ex'rs of Richardson *v.* Ex'r of Wyatt, 2 Des.

471, it was held "that the widow of one of the deceased copartners is not entitled to dower in the lands and houses purchased with the copartnership funds, and held in the names of all the copartners, or on their behalf."

The bill, in this case, was filed to obtain a settlement of two partnership concerns; the case was referred to a master, who (among other things) reported, that the complainant's testators were each entitled to one-third part of certain bonds taken at the sale of part of the real estate of the said concern mentioned in the pleadings, to the amount of £1,023 6*s*. 8*d*. To this part of the report, the eighth exception on the part of the defendant was filed, stating, "that the report was defective in not allowing a credit for the value of the dower of Mrs. Wyatt in the real estate of the concern (so far as relates to her husband's proportion), as she renounced her dower therein to the manifest benefit of the concern, and she never had been compensated." Although the circumstances are not very fully stated, yet it is to be inferred from what is stated, that Mrs. Wyatt, at the time of the sale of the land producing the fund, agreed that it should be sold free of her claim to dower, and that she would assert her right (in lieu thereof) to the fund produced thereby. The exceptions, it is said in the report, were fully argued, upon consideration whereof, it was determined that Mrs. Wyatt was *not* entitled to dower in the lands of the partnership.

In the case of Sigourney *v.* Munn and another, 7 Conn. 11, the English and American cases were fully examined. It appears that complainant and Munn were partners in the mercantile business; that they held real estate for the use of the firm, a part of which was put in as stock at the formation of the partnership by the complainant, and the residue was purchased afterward by the firm, with partnership funds; that the partnership was dissolved, but its business not settled, on April 1, 1826; that on March 24th, Munn, without the knowledge of complainant, mortgaged his interest in said real estate to John Holbrook, one of the defendants to secure the individual debt of Munn to him for $2,983.87. 337] *Holbrook, at the time he took the mortgage, had no other knowledge that the lands were company property, except what may have been derived from the records of the former deeds. The bill prayed for an account, a division of the partnership effects, and for a conveyance of Munn's interest in the lands. The

report of the committee showed that there there was $878.69 due to complainant from Munn, after crediting all the property of the firm, real as well as personal, amounting to $39,759.21.

Chancellor Hosmer, in delivering the opinion, states "that courts of law, who look at the legal title only, will consider persons in the above predicament merely as tenants in common. But courts of *equity*, unfettered by technical rules, and regarding the *justice of* each particular case, will break through the exterior form of a transaction, and if real estate is acquired with partnership funds for partnership purposes, will consider it as the *stock* of the company, and the legal owners as trustees for those *beneficially interested*. It is an obvious truth that partners are sometimes obliged to vest part of the company fund in real estate, the better to carry on their trade; and when this is done, common sense and *natural justice* demand that houses and land thus acquired, with joint capital, for joint purposes, should be considered as partnership property, and be liable to all the incidents attending the company's stock. . . . To enter on an examination of all the cases decided in Westminster Hall, in which the subject in question has been extensively discussed, would be both tedious and unnecessary. That partnership capital, invested in real estate, for the purposes of accommodating the partnership business, is, in chancery, deemed personal estate, and part of the company's fund, has been decidedly established. Decisions to the contrary have been made, it is admitted; but the number and weight of determinations are altogether in favor of the preceding principle." In conclusion, he says: "I think there exists no reasonable doubt that the land in question, put into the company stock in part and partly bought for partnership purposes, with partnership funds, and the whole being under an express agreement, that it should be *partnership property*, must, in equity, be considered and treated in this light."

Chancellor Kent, in 3 Com. 37, ed. of 1836, says: "If partnership capital be invested in land for the benefit of the company, though it may be a joint tenancy in law, yet *equity* *will [338 hold it to be a tenancy in common, and as forming part of the partnership fund; and the better opinion would seem to be that equity will consider the person in whom the legal estate is vested, as trustee for the whole concern, and the property will be entitled to be distributed as personal estate. The point has been extensively discussed and considered in this country, and the cases are

not inconsistent with this principle, when they admit, upon grounds of reason and policy, that real estate, acquired by partnership funds, and held by partners in common, may be conveyed or charged by one partner on his private account, to the extent of his legal title, whether that legal title covers the whole or a part of the estate; provided the purchaser or mortgagee dealt with him *bona fide* and without notice of the partnership rights, and there was nothing in the transaction from which notice might reasonably be inferred. In Tennessee, an estate so held in joint tenancy by partners, for the purposes of trade, may be sold by the survivor, in whom is the legal title; but he will be subject to account to the representatives of the deceased partner for their proportion of the proceeds. In New York, the Supreme Court, upon the strength of the ultimate opinion of Lord Thurlow, in Thornton *v.* Dixon, and of the opinion of the master of the rolls in Balmain *v.* Shore, declared in Coles *v.* Coles, 15 Johns. 159, that the principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, did not apply to real estates; and that in the absence of *special covenants* between the parties, real estate owned by partners, was to be considered and treated as such, without any reference to the partnership. The language of the Supreme Court of Massachusetts, in Goodwin *v.* Richardson, 11 Mass. 469, is nearly to the same effect; and it seemed to be considered that partners, purchasing an estate out of the joint funds, and taking one conveyance to themselves as tenants in common, would hold their undivided moieties in separate and independent titles, and that the same would go, on the insolvency of the firm, or on the death of either, to pay their respective creditors at large. These latter cases, and particularly the one in New York, go to the entire subversion of the equity doctrine now prevalent in England; but the other American decisions are more restricted in their operation, and are not inconsistent with the most correct and improved view of the English law. 339] Their object is to secure the rights of purchasers and *incumbrances without notice, from being affected by a claim of partnership rights, of which they were not ignorant.

Chancellor Kent, also, in the same volume, page 39, note *a*, in noticing the decision of the vice-chancellor in New York, in the case of Smith *v.* Jackson, 2 Edw. 28, who adopts the opinion of the Supreme Court of New York, in Coles *v.* Coles and holds,

that though real estate be purchased with joint funds for partnership purposes, there is no survivorship as to it; and that the share of a deceased partner, as a tenant in common, descends to his heirs, unless there be an *agreement* among the partners, that the lands so purchased shall be considered as personal property; and that then, upon the foot of that agreement, and not without it, equity would apply the lands to pay partnership debts; and that the wife is entitled to dower in the partnership share of the husband so descended, says, "The decisions on this side of the question appear to me to be a sacrifice of a principle of *policy*, and, above all, a *principle of justice*, to a technical rule of doubtful authority. There is no need of any *other agreement*, adds the chancellor, than what the law will necessarily imply, from the fact of an investment of partnership funds, by the firm, in real estate, for partnership purposes. If the parties mean to deal *honestly*, they can not have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts."

Judge Story, 1 Com. on Equity, 624, in treating of partnership property, says, "A court of equity considers the real estate, *to all intents and purposes*, as personal estate; and subjects it to all the equitable rights and liens of the partners, which would apply to it if it were personal estate. And this doctrine not only prevails as between the parties themselves and their creditors, but, as it should seem, as between the representatives of the partners also. So that real estate, held in freehold, fee, or for the partnership, and as a part of the funds, will, upon the death of one partner, belong, in equity, not to the heirs at law, but to the personal representatives and distributees of the deceased; unless, perhaps, there be a clear and determinate expression of the deceased party, that it shall go to the heir at law beneficially."

After having referred to so many authorities, both English and American, to show that the absence of the *agreement*, that the property should be sold for the payment of the debts of the firm, makes no difference in a court of equity, and that the authorities, *to the contrary have long since been overruled in the very [340 court where the distinction was first taken, it would seem wholly useless for me to cite others, or to detain the court with comments upon them. It is, however, worthy of remark, that the result of these authorities goes much farther than it is necessary they should go in order to sustain our defense; for they not only show

that the partnership lands are to be treated as personalty, in favor of creditors, but also as between the partners themselves, and their personal representatives and heirs. In the case at bar, the question in effect is one between the complainant and the creditors of the firm, the bill showing that the entire proceeds of the lands in which dower is demanded, are *necessary* for the payment of partnership debts.

It has been and probably will again be said by the learned counsel for complainant, that the land in the case of Greene v. Greene, and in some of the other leading cases cited, was acquired for the purpose of the better enabling the parties to transact the business of the firm, and not as an article of trade or commerce; and, therefore, that the *principle* of these cases do not apply to a case where the buying and selling of land constitutes a part of the business of the concern. It is true, that in England, where real estate changes owners much less frequently than in this country, there is, perhaps, no such thing known as partnerships formed for the purpose of buying and selling lands. But, in this country, where land is an article of trade and commerce, where it passes from one to another with almost as much facility and ease as personal estate, it is otherwise. Where is the difference in principle in the two cases? In the first case, it is held to partake of the nature of personal estate, because it is acquired with joint funds for use of the partners as such; and because sound policy and justice to creditors requires that it should be treated as the other property of the firm. The same reasons apply with all their force to this case; the doctrine is established to favor trade and commerce. But many of the above authorities, especially those from Kent's Commentaries, the late English cases, and Story's Equity, are of general application, and apply to *all* the real estate acquired by a partnership concern with its joint funds. I presume that no *case* can be found sustaining such a distinction; on the contrary, I think that the general principles governing the leading cases on this subject, can be shown to have been frequently applied to cases analogous to this. Lord Eldon, in 1 Swanst. 521, 341] before the doctrine on this subject was as *well settled as it now is, says, "in the case of a freehold purchased by a partnership, and intended only as an article of *stock*, a question might arise on the death of a partner, whether it would pass as real

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estate or as stock—personal estate in enjoyment, though freehold in nature and quality."

In Robinson *v.* Crowder, 4 McCord, 519, it is held "that one partner can not transfer the real estate of the firm, used for its business, by deed, unless it be in a case in which the *buying and selling of real estate* is the object of the partnership. This determination shows, that where the object of the partnership is the buying and selling of real estate, the subject of their trade becomes strictly commercial; insomuch that the rule that one partner can dispose of the partnership effects, applies to real estate acquired for this purpose when it would not apply to the transfer of a single item of property acquired as a place for transacting the business of the firm. In the case of Gilmore *v.* North American Land Company, et al., Peters' C. C. 460, a general principle of law applicable to partnership property was applied unhesitatingly to a trading and speculating partnership in wild land, where 6,000,000 of acres had been acquired, by the court holding that "a purchaser under an execution against one partner, becomes a tenant in common with the other partners, in an undivided share of the land purchased, subject to all the rights of the other partners, and that until the partnership debts are paid, he can have no claim, but on the separate interest of the individual partner in the residue."

It appears to me that the authorities place the case beyond the reach of doubt—that to give the complainant dower would be retrograding in the science of jurisprudence, and adopting an *exploded* doctrine of the English courts. I therefore can not doubt that the decision of this case will accord with what Chancellor Kent justly styles "the most correct and improved view of the English law."

VAN TRUMP, for plaintiff:

The question is one of importance, whether considered in relation to the rights and interests of the parties, or as settling, in this state, a principle of law involving doctrines of high import in the future administration of justice; and deserves, therefore, the most careful and serious consideration. That dower is an estate highly favored in law is a proposition, which, at this day, needs the *citation of no authority to sustain. *Favorabilia in lege* [342 *sunt, viti, fiscus, dos libertas*, was an acknowledged maxim of the courts; and is frequently cited by the old writers and reporters of the common law. As an estate, considered either at law or

upon principles recognized in equity, it is deeply entrenched within the great principles of moral and social obligation; and the defendants will have to show a *departure*, on the part of the courts, from a fundamental doctrine of the common law, before they can ask from this court a decree against the plaintiff in this case. The whole reason and policy of the law is against them; and to make themselves an *exception* thereto, they will have to rely upon a few modern decisions in which the *direct question of dower* was not distinctly raised or decided. That is, in all the cases upon which they will have to rest their case, where the question was as to how partnership real property should be considered, the controversy has been, either between the real and personal *representatives* of the deceased partner themselves, or between them and the creditors of the partnership. Of course, those representatives stood precisely in the shoes of him whom they represented, and took the estate, if they took it at all, subject to all the incidents, and all the liabilities, which attached to and incumbered it in the hands of the deceased partner. The stream can not be higher or purer than the fountain; they could not take a better right than he had who was the source of that right. An estate can not be changed by a mere transition as to parties; it is, in itself, unchangeable; and the representatives of a deceased ancestor must receive their inheritance precisely in the same condition in which he held it. But when the right of *dower* is to be considered, as between the parties, quite another and a higher question presents itself. The widow of such ancestor stands independent of and above his representatives; her title being a vested, and without her consent, an indefeasible interest, from the moment of coverture, becomes consummate by and at the death of her husband, and as a legal consequence, *relates back* to the time of the marriage and the seizin which the husband then had. No act of his, subsequent to the marriage, can divest or defeat that interest. She is indebted to him in no other respect, for her estate in dowery, than to the coverture and to his seizin during the coverture. Questions, therefore, between his *representatives*, or between them and third persons, can have no bearing upon her rights, because she is not a party thereto, and has no analogous connection with his estate. What, then, are the prominent facts
343] *in the case now before us, which distinguish it from all the cases where the question has been agitated as to how real estate,

held in partnership, shall be considered? It is important to mark these distinctions with due particularity. In the first place, it is admitted that Williamson and Hampson, who composed the partnership, were not partners, exclusively, in any *particular business* or *special trade;* that they entered into partnership, without written articles, as "builders, master carpenters, and *general speculators;*" and that there was no *special agreement* between them *how* the real estate so acquired in partnership should be considered.

These facts, stated in the bill and admitted by the demurrer, it is essential to consider in order to show how this case is to be distinguished from all the cases which may be cited by the defendants as binding adjudications upon the subject of real estate held in partnership. There are, then, three distinct questions upon which this case is to be distinguished:

1. That the real estate, purchased and held in partnership, was not necessary or intended for the prosecution of any particular trade or business.

2. That the partnership was a general joint interest or ownership of all kinds of property, real and personal; and,

3. That there was no express agreement between the partners how the real estate so held should be disposed of at the dissolution of the partnership.

These questions will be considered with reference to the cases applicable to them, taking the cases as they arose in order of time.

The counsel for the defendants will attempt to show that the allowing of dower in partnership property is a hardship *quoad* the creditors of the partnership, and as being against what they may conceive to be the principles of justice and policy. True, this may frequently be the fact; but it is yet to be established as a sound rule of policy, that because a law may occasionally work an individual hardship, *a priori* the law itself is impolitic, as a general rule, and should be abolished. The hardship, therefore, of this particular case, if it is so, is a *legal hardship* sanctioned by the reason and spirit of law and strengthened by a high sense of moral duty. But wherein consists the hardship or the impolicy? If it is impolitic they must charge such want of policy to the general *law* and not to this particular *species* of dower. Because, if it is admitted, and it can not be denied, that the wife is dowable at common law (and our statute concerning dower is *but a [344

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special recognition of the common law) of such estates of inheritance as the husband may be legally seized of during coverture; then, as a necessary consequence of that general rule and statutory recognition, real estate held in partnership, unless, as the defendants claim, there has been a special judicial *exception* adopted in relation thereto, must be subjected to all the incidents of dower whenever the property itself is such an estate as the heirs may by possibility inherit. How is dower, then, in partnership property more repugnant to a sense of right and justice than in a great variety of other instances where that estate attaches and becomes consummate at common law? Take, for example, the doctrine of *instantaneous seizin*, and we shall find rules of much greater rigidity laid down by the sages of the law in support of this estate, As where land, according to Sir William Blackstone, 2 Com. 132. "abides in the husband for a single moment;" or, as that profound lawyer, Mr. Preston, Esp. 546, interprets it, where he has seizin for an instant, "beneficially for his own use," the title to dower shall rise in favor of the wife. Thus, where lands descend on a man who is married, and a stranger enters by abatement immediately after the death of the ancestor, there the wife of the heir shall have her dower, and yet the husband has merely a seizin in law, and that for an instant only, for the abatement divests it from him. Perk. 372. This might work an extreme hardship to an innocent purchaser without notice. So, in the case of father and son, joint tenants, who were hanged out of one cart, where the question depended upon the priority of their deaths. Cro. Eliz. 503. And even where a husband *tortiously* gains an instantaneous seizin, as against the person benefited by and deriving an estate in virtue of such tortious act, the wife is entitled to her dower. W. Jo. 317. It is not to be supposed, it is true, that modern courts will adhere inflexibly to the rigid doctrine of *stare decisis;* but we have a right to expect, when a rule of law has been once deliberately and firmly settled, that they will not disturb it unless for reasons the most satisfactory and unimpeachable

It is proper, here, to take a view of the decisions in England upon the question of real estate held in partnership, and see how far and in what respect they will apply to and govern this case. I shall consider them in the order of time in which they arose, without any regard, for the present, to the relation in which they may stand to the three distinguishing characteristics of the case

now before the court. And it may not be amiss to notice what *otherwise might appear as *prima facie* against the estate [345 of dower in partnership property, that the reason why this question has not oftener arisen in England as to lands held in partnership is, that the practice of substituting an estate in jointure in lieu of dower incumbrances, has almost entirely excluded dower, as an estate *de facto*, from the English law. In every case, however, where the question has been raised, dower *has been decreed.* It will be seen, from the most careful examination of the English cases, that they are to be distinguished from the case at bar upon a number of distinct and material points; and, first of all, is the extraordinary fact that, so far as the decisions in *favor* of considering real estate held in partnership as personalty are concerned, *there is not a single case in which the abstract question of dower has been raised.* As between the real and personal *representatives* of a deceased partner, it is a matter of but comparative insignificance *how* such estate should be treated. It is an issue which does not *reach the whole* question of estate, *inter partes*, where the right of dower is concerned. It is but a question as to which of two channels it shall take to reach the *same destination;* because, as between the representatives alone, be it decided as it may, the ultimate destiny of the *interest* in such estate, in most cases, would be the same. Or, indeed, as between the creditors of a deceased partner and his representatives, the question is not very materially varied; for in that case it is but a question whether those creditors shall have a *direct* recourse upon such estate, unfettered by other rights, or *indirectly* by its passing to the representatives, subject to their incumbrance. But dower is an interest paramount to all these considerations. It stands supported and protected by its own inherent independent character, unaffected by any such derivative incidents as attach to a *descendible* estate at law.

The first case in England in which the question was decided as to what character partnership real property should take in the classification of estates, was that of Thornton *v.* Dixon, 3 Bro. C. C. 199, A. D. 1791. That case came up by bill in chancery, upon the following state of facts: Joseph Dixon and two other persons, being seized in fee of a certain tract of land, called Broadmoor, entered into partnership for the term of twenty-one years as paper-makers, built mills thereon, and declared the uses

of the land to the use of themselves in fee as tenants in common. Three years thereafter they took in four new partners, jointly with the previous firm, in different proportions of interest; with 346] *a covenant, on the part of the parties to the old firm, to stand seized of the land in trust for the entire partnership. During the second partnership, they bought a freehold messuage, with land adjoining, called Meerbeck, for the purposes of the partnership trade. The second partnership expired by limitation; but the business was still carried on in partnership, without any subsequent special agreement. The only question was, as to the equitable quality of Broadmoor and Meerbeck, which arose upon a claim, as administrator to his wife, by the husband of one of a deceased partner's daughters (which daughter, after her father's death, had been admitted into the partnership, and also died, leaving her husband, the plaintiff, living at her death), to her distributable share of the whole partnership property, as *personal estate*. One of the defendants, the widow of said deceased partner, *set up title to dower* in the lands held in partnership. The heir at law of the wife of the plaintiff was also a defendant, claiming her share of the partnership lands *as real estate*, by virtue of such heirship; and whether the lands so held by the firm were to be considered real or personal estate, was the question for decision. Lord Thurlow gave his opinion on the case at two different times, and upon both sides of the question. His second opinion, however, was made up upon more mature deliberation, and in opposition to a previous bias of mind in favor of the other side of the question. In his first opinion (January 21, 1791), he is reported to have said: "He had always understood that where partners bought lands, for the purposes of a partnership concern, it was to be considered as part of the partnership fund; and that, consequently, Broadmoor and Meerbeck must be considered as personal estate, and distributable as such." The cause was then suffered to stand over, and his lordship gave liberty to argue the nature of the property, if his proposition on that point could not be maintained. When it came up the second time, he gave his final and corrected opinion as follows: He thought "that had the *agreement* been that the mills should be valued and sold, it would have converted them into personalty of the partnership, but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that after the dissolution, the property

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would revert in its respective nature—the real as real, and the personal as personal estate.

Buckridge *v.* Ingram, 2 Ves. jr. 652, A. D. 1795. This was a case in which several questions were involved, among which the point was raised whether shares in the Avon Navigation *Company were real or personal estate; and if the former, [347 whether the widow of a deceased shareholder was entitled to dower in his share or shares; and the decision of the court was, not only that the shares in such company were real estate, but that the widow of a deceased partner or shareholder was dowable thereof. After deciding that the shares were realty, the master of the rolls, Sir William Grant, thus notices the question of dower therein: "The next question is, whether if it be so (*i. e.*, if it be real estate), the wife of the testator is entitled to dower; and I think that question more clear than the former; for when once that is settled, dower clearly arises as a consequence." This case must have an important bearing upon the case now before the court, unless it can be shown that there is a material distinction between a common partnership and a private corporation, *upon the very question in dispute.* The three cardinal distinctions between such associations are these:

1. That in a corporation, death or bankruptcy does not work a dissolution.

2. There is no *jus accrescendi* as to property held under their charter; and,

3. There is no individual liability, unless expressly so enacted, beyond the amount of stock subscribed.

Will either of these distinctions reach, or in any way influence the question now before the court? It is apprehended no argument is necessary to show that, upon the *abstract question of dower*, these distinctions can have no applicability whatever, as to real estate thus immaterially distinguished between two kinds of partnership sustaining almost a *precisely similar legal existence.*

Smith *v.* Smith, 5 Ves. 189, A. D. 1800. This was a partnership entered into by the parties, with an *agreement* that certain real estate, purchased with partnership funds, should be conveyed to one of the partners in severalty, in his own right, and that he should be considered as indebted to the firm, *in money*, for so much as should be paid for said estate. Some time afterward, a commission of bankruptcy issued against the firm jointly, and the estates so held in severalty by said partner were sold by the assignees under

the commission. At the time of the sale, an agreement was drawn up between the assignees and the wife of the partner so holding in severalty the aforesaid estates, which agreement recited that she claimed dower therein; that the purchasers under the commission required that she should release her dower and levy a fine; and 348] that the assignees, as an *inducement thereto, proposed in lieu of dower, the sum of £330, in case it should be found that she was entitled to dower in those lands; upon the execution of which agreement, she levied the fine accordingly. The case arose upon bill by husband and wife, praying a specific performance of said agreement, to which the defendants, among other things, set up in their answer that the estates were purchased with partnership funds, and for the use of the partnership, and that dower did not attach thereto in consequence. The case was heard before Lord Rosslyn, who decided that the widow was dowable of the estates so purchased and held by the husband, *expressly* upon the ground of the agreement that he was to be *charged upon the partnership books with the funds* by which the lands were purchased. Lord Chancellor: . . . "The distinction is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock; but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money. *The whole turns upon that.*" This case is worthy of consideration for this reason: If the doctrine contended for by the defendants in the case at bar be the true doctrine, then is the case of Smith *v.* Smith a mere nullity, and of no binding authority as an adjudged case. For once grant that all real estate, purchased with partnership funds (and whether *held* in partnership or not is immaterial, because it has been decided as between the partners themselves, or as between them and their creditors, that lands held in severalty by one partner, they having been acquired with partnership funds, *belong to the partnership*), is, to all intents and purposes, personal estate, distributable as such, and how does this case in 5 Vesey stand upon equitable principles? For the sake of argument, let us admit that all real property, purchased with the joint means of a partnership, is, even as against dower, but personal estate, subject to be treated as such upon agreement or without agreement between the partners; and does it not follow, *ex consequenti*, that the case of Smith *v.* Smith, sanctions and opens a

wide field for the perpetration of the grossest frauds upon community? If such were the law, how easy would it be to elude and bid defiance to it. How easy would it be for members of a partnership, if they wished to secure an estate in dower to their wives against law, to enter fraudulently into secret agreements among themselves, that the proceeds of the partnership should be laid out in lands as individual purchases, and debit *the amount accordingly. Will it be [349 denied that this would be in contravention of the law, if the law is such as this court is now called upon to declare it? It can not be. And moreover, would this view of the question, if the law *is* so settled, have escaped the observation of counsel so eminent as were those who argued the case of Smith *v.* Smith; or have eluded the acumen of a chancellor so distinguished for legal ability as was Lord Rosslyn, who decided it? It would be doing violence to the principles of common sense, so to imagine it. One of two things must be presumed—either that the chancellor was *ignorant* of the law, or that the law itself *did not so exist*, as it is now attempted to be expounded. If the law had been such, as it is now contended that it was and is, the chancellor in that case, in conformity with established rules of equity upon analogous principles, would have *followed those funds into the realty*, and held the realty itself, bound in the same manner as the funds would have been had they remained, *in specie*, with the partnership. Upon such view of the case and the law, it would have been his duty to have held the real property purchased in the name of Robert Smith, not only as personal estate, but as a *resulting trust* in favor of the partnership, and thus have barred the widow of her dower therein. But Lord Rosslyn took another and a better view of the subject; and inferentially, if not directly, sustained the doctrine, that, so far as dower is concerned, nothing short of an antenuptial and *express* agreement can change real estate held in partnership into a personal distributable fund.

Ripley *v.* Waterworth, 7 Ves. 425, A. D. 1802. This case grew out of a contest between the real and personal representatives of the testator. It is, shortly, this: Mears, the testator, was seized in fee of three eighth undivided parts of a freehold estate and sugar houses. Those three eighths, together with the remaining five eighth parts, were conveyed to the use of such persons as Waterworth, the testator, and Margaret Woods should appoint; and as to the testator's proportional shares, to his own use, for the

purpose of prosecuting the trade in partnership with the said Waterworth and Woods; and, in default of such appointment, upon the decease of the shortest liver of the three copartners, or upon the partnership being otherwise dissolved, to sell the sugar-houses and premises, and to apply the proceeds thereof to the discharge of incumbrances and debts, and the residue to be divided
350] ratably among the partners or their representatives. *The deed of partnership also contained a proviso, that in case there should be no appointment, then, upon the decease of the shortest liver of the three copartners, the two survivors, or either of them, might elect to take the share of the deceased partner, as well of the sugar-houses and premises, as of the implements, utensils, and fixtures, at certain prices. No appointment was made by the three partners; and, after the testator's death, the defendant gave notice that he elected to become the purchaser of the testator's three eighth parts of the premises; and he purchased them accordingly. The case came up before Lord Eldon, upon exceptions to the report of the master, and the question for his decision was, as to the nature of the testator's interest in the freehold estate and sugar-houses. Lord Chancellor: "Upon the subject of the first exception, I am strongly inclined to think this is personal estate; being of opinion that upon the true construction of the deed, the parties had contracted with each other, that when the partnership should be determined, whether by the act of the parties or of God, the property should be converted to all intents and purposes." . . . "This is a case in which, not an individual gives directions by will or other instrument as to his individual property, but the persons are CONTRACTING with each other as to what is to be done with property of a very peculiar nature. *By the deed, it is to be* CONSIDERED *part of the capital or stock in trade.* The subject, I admit, is real; but *combined with* a great number of fixtures, utensils, and implements; many of which are personal. There being three parties, it was rational they should so engage: and that, when the partnership should cease, the property should, *by mutual agreement, be disposed of*, as should be most beneficial to all of them." . . . "*The question is*, whether three persons engaging in a partnership of real property, *such as this*, and to be *applied to such purposes*, might not, *and did not*, CONTRACT, that if the partnership should be dissolved by the act of all, or the death of one, *it should all be sold together*, for the purpose of producing

more benefit upon the sale." I shall notice this case, with others, in a brief summing up hereafter.

Bell *v.* Phyn, 7 Ves. 453, A. D. 1802. It may be noticed as a most singular coincidence that this case was decided by Sir William Grant at the rolls, on the same day that Lord Eldon decided the case of Ripley *v.* Waterworth. This is a strong case; and, although Mr. Eden, in his note to Thornton *v.* Dixon, 3 Bro. C. C. 200, intimates that its authority is shaken, *if not entirely [351 overruled, I shall show that it stands unimpeached unless some very loose and general subsequent dicta are sufficient to overthrow it. The case involved the double question: 1. As between the real and personal representatives themselves; and, 2. As between the widow and the representatives collectively, upon a claim of dower. The real estate in question was partnership property, bought with partnership funds, *but without any agreement* as to how it should be considered upon a dissolution of the partnernership. The lands, however, were sold, and the question was raised by the bill of a legatee, praying an account of the personal estate, and claiming the testator's share of the proceeds of said partnership lands as passing under the will. Sir Wm. Grant: . . . "If this was partnership property, *there was nothing done by the partners to alter the nature of it.* The sum, therefore, for which the estate sold, must be considered of the nature of real estate; and there must be a reference to the master *to settle the widow's dower.*

Balmain *v.* Shore, 9 Ves. 500, A. D. 1804. The master of the rolls, in this case, held that the circumstances of a china and pot manufactory, and other premises, being purchased by a partnership of potters for the purpose of carrying on their trade, with covenants against alienation and partition, was insufficient to vary the nature of the property—that is, that it could not be thus changed into personalty, but must descend and have all the incidents of an estate at common law. It was a partnership entered into by the parties for the term of ninety-nine years, and the articles contained covenants against alienation or partition. The case stood upon a bill filed by the devisee of one of the parties (he having devised all his *personal estate* to said devisee) against the heir at law of the devisor and the remaining partners; and the question was, whether the realty, held in partnership, *passed as personalty* by the will, or descended *as real estate* to the heir at

law. Master of the rolls, after deciding several unimportant preliminary questions: "Another question is, whether the plaintiff is not entitled likewise to a proportional share of the land purchased for the use of the partnership; that is, whether, being purchased for that purpose, it is not to be considered personal property? After the case of Thornton *v.* Dixon, that is not a question that admits of argument, for this is rather a stronger case for the heir than that. There it was purchased generally, applied to the uses 352] of the *partnership, and, apparently, was purchased *for no other end.* Yet it was considered to be real estate by Lord Thurlow." . . . "The question for my decision is only, whether I can declare this real estate to be personal property, to go to the shares of the partnership. *That, I am of opinion, I can not declare.* The bill must be dismissed, so far as it seeks a declaration of the plaintiff's right as to the third part of the freehold premises."

Thus far, as to time, it will be seen that there can be no doubt how real property, held in partnership, was considered in England. The decisions clearly sustain this position, that where land is held in partnership, purchased with partnership funds, without any *express agreement* that it should be part of the *stock in trade;* or where its possession was not essential to the *prosecution of the partnership trade*, it should retain its real character, and descend accordingly. It is, however, now contended that these decisions have been, in effect, overruled by the subsequent adjudications of Lord Chancellor Eldon; and the cases of Ripley *v.* Waterworth, 7 Ves. 425 (already considered in its order of time); Selkrigg *v.* Davies, 2 Dowl. P. C. 230; Townsend *v.* Devaynes, Mont. on Part. App. 97, and Crawshay *v.* Maule, 1 Swanst. 495, will be cited in proof of this position.

The opinions of so distinguished a lawyer as Lord Eldon, when delivered upon points in issue, are entitled to have great and commanding influence; but mighty as was his juridical genius, profound as his legal attainments unquestionably were, it can not be denied that his lordship frequently *decided too much* in cases upon a given state of facts; that is the grasp and comprehensiveness of his mind were such, that it often led him into points, or rather tendencies, of a case, which *were not at issue at bar*, and consequently unargued and uninvestigated, if we may be permitted to except his own *ex parte* examinations, which have given rise to his numerous, if not unsatisfactory *dicta*, as found in the books

containing the reports of his decisions. But let us examine these cases, and see if even *they* will sustain the doctrine now contended for at bar, and defeat the claim of this petitioner, *under the peculiar circumstances of her case.*

The book in which the case of Selkrigg *v.* Davies is reported, I have been unable to lay my hands upon, and will have to be content to take it as noticed in the latest English case upon *the [353 subject, Randall *v.* Randall, 7 Simons, 271. The particular facts upon which that case arose are not given in that citation, but enough can be gleaned therefrom to know that it was a question as to real estate held in partnership, which estate *was necessary for the prosecution of some joint partnership trade.* The observations of the vice-chancellor upon Selkrigg *v.* Davies, as contained in his decision of the case of Randall *v.* Randall, are worthy of special consideration. I have *italicised* the remarks of Lord Eldon, as quoted and commented upon by the vice chancellor. The vice-chancellor: "Lord Eldon, in the course of the argument of the case, threw out a proposition which is TOO GENERAL. His lordship is reported to have said: "*My own individual opinion is, that all property involved in a partnership, ought to be considered as personal.*" The limitation of that proposition is to be collected from the report of the case, by which it appears that the proposition was laid down with reference to a case of partnership IN TRADE, between persons who held land for the PURPOSE OF THE TRADE. That that limitation ought to be put upon the proposition, is evident from what Lord Eldon says in the subsequent case of Crawshay *v.* Maule, 1 Swanst. 508. "*It has been repeatedly decided that interests in lands purchased for the purpose of carrying on a trade, are no more than stock in trade. I remember a case in the House of Lords, about three years ago,*" (Selkrigg *v.* Davies), "*in which the question was much discussed, whether, when partners purchase freehold estate, for the purpose of trade, on dissolution, that estate must not be considered as personalty, with regard to the representatives of a deceased partner.*" So that Lord Eldon has put an interpretation on his own words, which, taken by themselves, GO FARTHER THAN HE MEANT THEY SHOULD GO."

Townsend *v.* Devaynes, 1 Mont. on Part. App. 97. This case has never been *officially* reported; and its accuracy is more than apocryphal. It is said of it, *arguendo*, in the case of Phillips *v.* Phillips, 1 Myl. & Keene, 649. that there existed nothing but a

brief statement of the case as extracted from the pleadings, and that it did not appear whether there was or was not an agreement between the partners. Mr. Bickersteth: "It was a mistake, therefore, to suppose that Lord Eldon's decision in Townsend v. Devaynes, settled the question as to the conversion of such property, independently of contract between the parties. Mr. Montague mentioned that he was unable to decipher the *notes of the argument upon the brief from which he had extracted the statement, and there was no judgment; so it was impossible to know upon what ground the decision went." This statement of Mr. Bickersteth as to the character of Mr. Montague's note of the case of Townsend v. Devaynes, was not contradicted by the opposite counsel; it is, therefore, to be inferred that his statement was correct; and that the point upon which that case was really decided is not sufficiently clear to make it a binding authority. Mr. Jacob, also, in his edition of Roper on Husband and Wife (vol. 1, p. 346), accounts for the decision, on the supposition that there was an agreement between the parties, for the conversion of the property into personalty. "At all events," says the vice-chancellor, in Randall v. Randall, 7 Simons, 271; 10 Cond. Eng. Ch. 59, "that case decides only, that where parties in a trade purchase land for the purpose of the trade, it shall be considered as personal estate." These are the two cases—or rather, not the cases themselves, but the *dicta* to which they gave rise—which are said to overrule a current of decisions running from 1729, the time when Lake v. Craddock, 3 P. Wms. 158, came up to be heard before Lord Chancellor King, to 1804, when Balmain v. Shore, 9 Ves. 500, was decided.

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There remain for us to notice but three more cases, decided in England, which have any bearing upon the one now before the court, to wit: Phillips v. Phillips, 1 Mylne & Keene, 649; Broom v. Broom, 3 Myl. & Keene, 443, and Randall v. Randall, 7 Simons, 271, the latter of which, decided so late as 1835, is so directly in point, as to place the right of Mrs. Sumner to dower in lands held jointly by Williamson and Hampson, in the lifetime of Williamson, beyond the possibility of a doubt.

There are two other cases in which the question of partnership concerning realty arose: Crawshay v. Maule, 1 Swants. 495, and Fereday v. Wightwick, 1 Russ. & Mylne, 45; but as they were

only leasehold interests in lands, they can have but little application to the case at bar.

The case of Phillips *v.* Phillips, 1 Mylne & Keene, 649; 7 Cond. Eng. Ch. 208, is much relied upon by the counsel for the defendants; but it is so clearly distinguishable from the case at bar, upon a variety of important points, that it only requires to be stated, to show its entire inapplicability. The precise point decided was, that real estate, purchased with partnership capital, for the purposes of the joint trade, is personal estate in respect of the share of a deceased partner, and retains that character, as between *his real and personal representative, he having expressed [355 a desire in his will that it should be converted into personalty. The testator, after devising all his real estate, to his executors to be sold, uses the following language: "And my will further is, that the moneys which shall arise by and from the sale or sales of my freehold and copyhold estates, shall be deemed to be part of my personal estate; and that the clear yearly rents and profits of the said freehold and copyhold hereditaments, in the meantime, until the same shall be sold, or of so much thereof as shall be remaining unsold, shall, from and immediately after my decease, be deemed part of the annual income of my personal estate." It is true, the real property, purchased with the partnership funds, was after-acquired estate, as regarded the time of the execution of the will of the testator; and as such, being of freehold interest, could not pass to the legatees. From the fact, however, that the partnership real estate was purchased immediately after the date of the will, and there being no exception added by way of codicil, as to said subsequently acquired property, the intention of the testator is clearly inferable that it was to be considered as personal estate, although it could not legally pass in accordance with such intention. The fact, then, as to how the property was to be considered, is inferentially established by the will, notwithstanding the law would not permit it to vest in the person designated by the testator. But how far this may have influenced the court in their decision, we have not the means to know; neither do I press the point very strongly, that it should have been so influenced. There is enough in the case independent of this, widely to distinguish it from that now before the court; because, in this case, as in all the rest heretofore cited, the property was purchased for the purposes of the partnership trade.

Broom *v.* Broom, 3 Mylne & Keene, 443; 9 Eng. Ch. 118. This case only decides that real estate, purchased with partnership funds, for the purpose of carrying on a partnership trade, is to be considered as personalty, as between the real and personal representatives of a deceased partner.

Randall *v.* Randall, 7 Simons, 271. This is the last English case decided upon the subject, and as it will undoubtedly have, one way or the other, a great influence in deciding this case, it is important to state it somewhat particularly. In 1792, two brothers, named Randall, were entitled by descent, as tenants in common with two other heirs, to certain freehold estates, and agreed to 356] become copartners in the farming business, *including the growing of hops, and subsequently extended the partnership to the making of malt. They also, as partners, entered into a contract with the navy department for supplying the navy with biscuit. The farming and malting business were carried on upon the family estate, and the biscuit business partly on the same estate and partly on the separate estate of one of the partners. In 1802, the partners purchased, of another brother, his share of the family estate, and paid for it out of the partnership funds, but no conveyance was executed to them. The next year they purchased of a Miss Long, other real estate, paid for it in like manner, took no conveyance, and used the land for agricultural purposes. In 1808, in pursuance of an act of parliament for inclosing lands in their parish, certain allotments were made to said partners, generally in respect of their freehold land in the parish. The expenses of fencing, embanking, cultivating, and improving these allotments, were also paid out of the funds of the partnership. Other real estate was also brought by the partners, paid for out of the partnership funds, and used for agricultural purposes. Some of these estates were let to tenants; and the rents, and all other receipts and payments in respect of the rest of the estates, were regularly entered, by the partners, in the books of the partnership, and were carried to the account thereof. The malting business ceased in 1807; but the partnership in the farming business was continued until 1829, when one of the partners died intestate as to his real estate, leaving another brother his heir at law; and by will gave his *personal estate* to the plaintiff. The bill prayed that it might be declared that one undivided moiety of the estates which had been purchased by the partners, formed

part of the personal estate of the deceased partner, and that the defendant, as surviving partner, might be declared to be a trustee, of such moiety, for the plaintiff, as the personal representative of the deceased partner. Vice-chancellor Sir Lancelot Shadwell, after ably reviewing and distinguishing all the cases upon the question: . . . "Taking, then, the law to be as it is to be collected from the cases to which I have referred, the question is, whether the real estates in this case are to be considered as personal property. Now it does not appear that the parties purchased any part of the land for the purposes of their partnership in trade. Having, in the first instance, agreed to carry on the farming business in partnership, they subsequently agreed to become copartners, first as malsters, and afterward as biscuit-makers. The first purchase that they made was of an undivided *fourth-part of an estate of which they previously had a [357 moiety as tenants in common. It would, however, be strong to say, that because these parties, being partners in the farming business, which is not a trade, happen, collaterally to that business, to carry on a trade, therefore, the nature of the property which they so purchased is to be changed. And, consequently, I do not think that it would be right to hold that the one-fourth of the family estates, which Richard and William Randall purchased of their brother James, is to be considered as partaking of the nature of personal estate. The next estate was purchased of Miss Long; but it was never used for any of the purposes of the partnership trade; and as the judges who decided the cause to which I have alluded, have expressed their opinions to be, that land can not become personal estate, unless it is purchased for the purposes of the partnership trade, the land purchased of Miss Long, although it may have been paid for out of the partnership capital, can not be considered as partaking of the nature of personal estate. . . . The fair inference to be drawn from the facts of this case is, that the trade was collateral to, and arose out of the principal business of farming; and there is no reason to conclude, from any of the decided cases, that any of the property to which this suit relates ought to be considered as personal estate."

I have now examined all the cases which have arisen in England upon the subject of partnership real estate. The conclusion to be drawn from them is, that if partners, carrying on a trade, purchase real property, essential to the very prosecution of such

trade, such as sites for mills, etc.; or if there is an express contract or agreement between them, that the lands so held shall be converted into the stock of the partnership at its dissolution, the better opinion seems to be, that it will be changed into personal estate, and form part of the common distributable fund of the partnership. But if, on the other hand, the possession, by partners, of such real estate, is in no way connected with the very business of their trade; or, as it is happily expressed by the vice-chancellor in Randall *v.* Randall, if it is only collateral to, and not necessarily growing out of their trade, the authorities are clear and conclusive, that it retains its original character, and descends accordingly. This view of the subject is not a mere inference, deducible from the general tenor of the reported decisions—it is the *precise point* upon which all the cases have turned. Lord Eldon himself—sustains this position in its fullest extent. He says, in so many words, that he decided the case of Ripley *v.* 358] *Waterworth upon the ground that the partners had *contracted with each other* that the real estate held in partnership should, at the dissolution of the partnership, be converted into personalty. I have already shown that his opinions, in the other cases which came up before him, if he in fact ever expressed such opinions, were mere *dicta*, so far as they declare that all partnership property should be held to be personal estate.

There is another fact which may not be unworthy of consideration in this place. Lord Eldon was lord chancellor during the whole period in which Sir William Grant presided at the rolls. Now, if the opinion of the profession had been that the decisions of the master of the rolls were erroneous in the case of Bell *v.* Phyn and Baldwin *v.* Shore, as intimated by Mr. Eden in his note to Thornton *v.* Dixon, is it not fairly presumable that appeals would have been taken to the lord chancellor? And if the lord chancellor had, in reality, entertained views adverse to the doctrine which those cases establish, would not the profession, in all probability, have been cognizant of the fact; and whether they were so cognizant or not, anterior to the decision of Ripley *v.* Waterworth, would not Lord Eldon's decision in that case, if it is indeed opposed in principle to the prior decisions, have given them the strongest inducement to take up the case of Bell *v.* Phyn, decided as it was, on the very day on which Ripley *v.* Waterworth was heard and determined? It is, moreover, a most

remarkable fact, that Lord Eldon, in his subsequent decisions, never even so much as *alludes* to the cases decided at the rolls. If he entertained the views which are ascribed to him, would he not have remarked upon those cases, and pointed out and exposed their fallacy? It is not only very proper, but it is also his official duty so to do; because the decrees at the rolls are reported in connection with his own decisions, and unless corrected, when relevant for him to do so, they must be received with the same respect as is accorded to his own final adjudications. From the whole view of the subject, then, it is not a legitimate presumption to suppose that Lord Eldon entertained other views upon this question than what are strictly in accordance with the acknowledged opinions of Lords Thurlow and Rosslyn, and Sir William Grant. At any rate, it will require something more than the mere *imagination* of learned and ingenious counsel to establish it.

This being the law in England, let us now see how far it has been adopted in this country, and whether it has been, in any *degree, changed or modified. I shall consider the Ameri- [359 can cases, also, in their order of time. And I shall cite the first case, not from any very close analogy which it bears to the case at bar, upon the facts, but to show, constructively, the opinion on this subject, of one of the greatest lawyers that this or perhaps any other country has ever produced. I allude to Chief Justice Parsons, in the case of Pitts *v.* Waugh and Greeley, 4 Mass. 424, A. D. 1808. The plaintiff in that case brought an action on the case against the defendants, as partners in merchandising and in the sale and purchase of lands. It appears from the pleadings, that Waugh executed a promissory note to the plaintiff, signed by himself alone, as an individual; upon which note suit was brought jointly against the defendants, as partners. At the trial, the plaintiff offered the note in evidence, and further offered to prove that at the time of making the note, the defendants were partners, and that the note was executed on the partnership account, for lands purchased for the benefit of the partnership. The court refused to admit either the note or the evidence, to which the plaintiff excepted. Parsons, upon the exception: "By the law-merchant, a man may be answerable as a dormant partner, on a contract made by the partnership, of which he is in fact a member. But this law is confined to trade and commerce, and does not extend to the

sale and purchase of lands." . . . "However, to prevent mistakes, we repeat, that the law-merchant does not extend to speculations in lands." I only seek to make this case relevant to the one at bar by construction—and in this way: What does the chief justice mean, by saying that the *lex mercatoria* does not apply to speculations in land? Does he mean to confine his remarks to that particular portion of the law-merchant which relates to dormant partners; or does he mean a more general application, and wish to be understood to say, that the law-merchant, as a system, does not apply to speculations in real estate? I confess it strikes me that he means the latter; because Judge Parsons, as a solemn expounder of the law, generally meant precisely what he *said* upon a subject. And if he meant to be understood that the law-merchant generally did not apply to dealings in land, wherein consists the difference, upon principle, between that and the law of partnership? Although the law-merchant is a customary law, yet, equally with the law of partnership, it derives its existence from, and is sanctioned by, the *general* law; so that no mere conventional rule 360] adopted by merchants, in regard to *their transactions as merchants in real estate, could impart to such transactions a different character from that put upon them by the law of the land. The law-merchant, like the *lex et consuetodo parliamenti*, is indeed only a portion of the general law. Mr. Justice Foster, 2 Burr. 1226, declares it to be part and parcel of the *lex non scripta* itself. It is clear, therefore, that no mere special custom among merchants is the ground of Judge Parsons' decision. It is his interpretation of a general law for the regulation of trade and commerce, and it is apprehended that any other general law connected with trade and commerce, the law of partnership for instance, would have received from this distinguished civilian the same interpretation, had it been an issue for his judicial opinion. Goodwin *v.* Richardson, 11 Mass. 467, A. D. 1814: This case decides that where two parties buy land with partnership stock, and there is nothing more done in the way of agreement between them, how it is to be held, it is not in law considered as partnership property; that is, it is not subject to the rules of law governing partnerships generally.

Coles *v.* Coles, 15 Johns. 159, A. D. 1821: This was an action of assumpsit, by the administratrix of a deceased partner, against the surviving partner, for money had and received, upon a sale of real estate belonging to the partnership, sold jointly in the partner's

lifetime, the proceeds whereof were converted to the use of the defendant. The property so held in partnership, and sold by the firm, consisted of a distillery and two lots, and the business of the partnership was continued up to the time of the sale. The court decided that "when real estate is held by partners for the purposes of the partnership, they do not hold it as partners, but as tenants in common; and the rules relative to partnership property do not apply in regard to it. There may be special covenants and agreements entered into between partners, relative to the use and enjoyment of real estate owned by them jointly, and the law would be considered as held subject to such covenants; but nothing of that kind appears in the present case; and in the absence of all such special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership."

McDermott *v.* Lawrence, 7 Serg. & Rawl, 438, A. D. 1821. The facts of this case are not necessary to be stated. But the opinion of the court, as delivered by Chief Justice Tilghman, is *important to show the estimation in which the English [361 cases, and particularly the decisions of Lord Eldon, were held by that eminent judge. He says: "How far land, conveyed to partners as tenants in common, shall be considered as partnership property, and whether it changes its nature, and becomes personal estate, has been the subject of discussion in England and some of the states. Land, *except for the purpose of erecting necessary buildings*, is not naturally an object of trade or commerce. Yet there is no doubt that, by the agreement of the parties, it may be brought into the stock, and considered as personal property, so far as concerns themselves, their heirs, and personal representatives. It was so decreed by Lord Eldon, in Ripley *v.* Waterworth, 7 Ves. jr. 424." Speaking of Thornton *v.* Dixon, 3 Bro. Ch. 199, he says: "This is a very strong case, *as the mills were used in the partnership business.*" And after considering all the English cases, he makes this remark: "I know of no other English cases which bear on this subject, and these were in dispute between the *heirs and personal representatives.*" The judge marks this sentence in *italics*, just as it appears here, thereby clearly sustaining the distinction which I have already taken in regard to the parties to most of the cases, to wit: that the question as decided between the representatives of a deceased partner, or between them and

third persons, does not, *ipso facto*, settle, or in any way touch the question of dower in partnership lands.

After applying all the authorities to the case then at bar, Judge Tilghman thus speaks of the decisions of Lord Eldon: "Even Lord Eldon has not considered the property as personal, unless it was made so by the agreement of the partners."

Greene *v.* Greene, 1 Ohio, 535, A. D. 1824. It is, in my estimation, unnecessary to enlarge upon this case, inasmuch as it is distinguishable from the case at bar upon the two important questions which have governed the whole current of English decisions, viz: that there was not only an express agreement between the partners that the realty held in partnership should be converted into personalty, but the lots in dispute were bought for partnership purposes, and were essential to the prosecution of their partnership trade. The opinion of the court, as delivered by Judge Sherman, is an able exposition of the law relating to partnerships generally, and contains the following accurate and forcible condensation of the whole doctrine of partnership real 362] property, as drawn from and sustained by *the English decisions: "Where real estate necessary or convenient for the conducting a trade is purchased by a partnership, and paid for by their joint funds, under an agreement that they shall, at the termination of the partnership, be sold for the payment of debts, and the residue of the partnership effects are insufficient to discharge the debts, that the land so purchased, whether conveyed to one or all of the partners, is not subject to dower of the widow of a deceased partner." That this case of Greene *v.* Greene is a sound and correct decision, upon its own particular facts, there can be no doubt. It is one of Lord Eldon's cases of "contract;" for the point upon which the learned counsel for the defendants most relied, and upon which the whole reasoning of the court was based, was the agreement between the partners in their partnership articles. It is somewhat strange that the important fact that the partnership contract was antenuptial, so far as the coverture of the demandant was concerned, does not appear in the statement of the case. This fact, however, is fairly presumable; otherwise the authorities cited upon that point were entirely irrelevant. It is clearly manifest, too, from the language of the court: "If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the hus-

band and the wife, when there is an agreement, unless it were executed after her right attached," etc. But the learned counsel for the defense in the case at bar will argue and attempt to show that where there is no express agreement to that effect, the law will very kindly step in and imply one as between partners holding real estate jointly as partnership property. That this may be the fact, as between the partners themselves, unconnected with any other right, it is not my wish or design to controvert; neither has it anything to do with this case, because the law never raises an implication, adverse to a pre-existing right, when the person in whom such right is vested is not a party to the acts upon which the implication is raised. The law, therefore, by no implication, as between other parties, and upon other merely collateral facts, can affect a right already existing by its own authority. The law, in its implication, like in everything else, is always consistent. It does not create an express right to-day, that it may destroy it by implication to-morrow. That would be a kind of legal suicide. But it may be contended that there is no pre-existing right in favor of the wife, as to lands held in partnership, because the implication of law upon *the agreement of the [363 partners attaches *eo instanti* with and overcomes her right to dower therein. But is this true? At the time of the marriage of husband and wife, there exists an implied contract (for Sir Joseph Jekyll and other eminent judges have held that dower arises *ex contractu* as well as by act of law) that the wife shall have dower in all estates of inheritance of which the husband shall be seized during coverture. This being admitted, is it competent for such husband, being a party to this implied contract with his wife, subsequently to enter into other agreements with other persons, by which implications are to be raised defeating a prior legal implication upon his own acts? Such an idea would be absurd; if it is law, it is not logic.

Sigourney *v.* Munn, 7 Conn. 11, A. D. 1828: This was a bill filed by one partner against the mortgagee of the other partner, who held a mortgage on the undivided half of the real estate of the partnership, which real estate consisted of lots upon which were built the storehouses in which the partnership business was carried on. Judge Hosmer, in delivering the opinion of the court, classified the cases upon real estate held in partnership under three distinct heads. It is only necessary, for our purpose, to notice his first class,

which is analogous to the case now at bar, in all its bearings, and from which he distinguished the case then before him in the strongest possible terms. He thus describes the first class: "The first of them exists when partners invest part of their capital in land, without any reference to the accommodation of the partnership business, and without any special agreement concerning the use of the property. This class," says the judge, in applying it to the case then before him, "is so distinct from the case before us that to discuss it would be useless." He then concludes an able and discriminating review of all the cases with the following observation upon the case then before the court: "I think there exists no reasonable doubt that the land in question, put into the company stock in part, and partly bought for partnership purposes with partnership funds, and the whole under an express agreement that it should be partnership property must, in equity, be considered in this light."

There are a number of other recent American cases upon this subject, to the reports of which I have not had access. The case of Smith v. Jackson, 2 Edw. N. Y. Ch. 28, cited in 2 Barb. & Har-
364] ring. Eq. Dig. 353, goes so far as to decide that lands *held in partnership, for partnership purposes, are real estate, and descendible as such. It is said, also, that the case of Yeatman v. Woods, 6 Yerg. (Tenn.) 20, sustains the same doctrine. These cases are cited merely to show that some of our courts, and of high authority too, are disposed to confine the operation of commercial law upon real estate to even narrower limits than the English decisions have done.

The limits of this argument, already too far extended, will not permit me to speak in detail of the facts, if indeed it were necessary, by which the case now at bar is clearly and unequivocally distinguished from all the cases which have been noticed. It is enough to say, that in this case the lands purchased and held by the partners, were in no way connected with or incidental to their partnership trade. The fact that two individuals happen to carry on a trade in partnership is no good reason why they should not be permitted to hold real estate jointly, just in the same manner that any other two individuals may hold such estate who do not happen to be partners in a trade. And although the learned counsel for the defendants will labor to impress it upon the court, that the granting of dower in such property would be *inter apices*

juris, yet we contend that it is consonant with the strictest principles of justice as well as of law.

LANE, J., delivered the opinion of the court:

The point arising in the present case affords an example of the changes by which the law accommodates itself to the varying circumstances of the age.

No distinction was made by the Roman law between real and personal estate; both were subject to the same condition of descent or other legal disposition. When feudal principles predominanted, land, the reward of the soldier, or the means of organizing the military force of the government, was withdrawn, in a great measure from the control of the occupant or from liability to his debts, and held subject to the rule of descents only. The efforts of centuries have been directed to the emancipation of the realty from these restrictions, and its inviolability has been so impaired by subtle contrivances, by open or indirect attacks, by the wearing out of ancient usages, and by the adoption of new principles, that it may now be molded to most exigencies, and the dominion of the owner over it is nearly as complete as over chattels.

*Wherever a proper partnership subsists, the partnership [365 debts impose a lien upon the partnership property, both as between the partners themselves and the creditors and the partners, or their representatives. 6 Ohio, 113. This lien arises at the acquisition of the property, from the relation itself of partners and is liable to be defeated by a *bona fide* sale only.

If lands can be holden in partnership after the same rules as personalty, the right of the dower must be subordinate to this lien. For her estate is derived from her husband, and is subject to all incumbrances existing against it, at the acquisition of his title. 1 Ohio, 542.

In the earlier stages of the common law, no proper partnership in lands could subsist; but as social arrangements became more complex, land was necessarily used in partnership purposes, firstly as auxiliary to the general objects of the association, or received for debts, and more lately as direct capital stock. Numerous cases upon this subject are cited in the arguments. They show that the same rules which affect chattels have gradually been extended to lands held for partnership purposes; that wherever partners man-

ifest their intention to hold lands as partnership stock, either by express convention, or by their course of dealing, it will be treated as such in all respects by courts of equity. If such be the law in England, and in the elder states, its policy is more imperative here, where real estate is so much the subject of traffic.

Demurrer sustained; bill dismissed without costs.

JAMES SMITH ET AL. *v.* D. BERRY ET AL.

Where the words "I devise my lands" are employed in will, they are sufficient to pass an estate of inheritance.

PETITION for partition from Champaign county.

The facts are these: In 1833, Ackery Berry, by will, devised to his three sons as follows:

"First of all, I do give unto my son, David Berry, the one third part of all my land that I now have in possession. And the above, named David Berry is to have his third part off the east side of my land, to be divided from the rest by running of a straight line from north to south. I also give unto my son, Elijah Berry, the other third part of my land, that is, the middle third, from north 366] to south, adjoining my son David, on the west side. *I also give my son, Joseph Berry, the last third which lies to the west, adjoining Henry Sibert's line from north to south, on the east side of said Sibert's land."

He then bequeathed *all his movable* estate to his son Joseph and his two daughters, who had intermarried with Marrs and Smith. He died in January, 1834. After the death of the devisor, Elijah Berry died, leaving a widow and several children. Joseph Berry has also died intestate, but without issue. The petitioners, Smith and Marrs and their wives, pray partition of the land devised to Elijah Berry, as heirs at law of the Ackery Berry, upon the ground that their brother Elijah only took a life estate under the will.

HAMILTON and YOUNG, for the defendants:

Contended that a devise without words of perpetuity passes but a life estate, unless *other words in the will* show the testator's *intention* to convey a *larger* estate. The omission to devise the remain-

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der, can not evince an intention to *pass one.* It would indeed be strange that a *failure to devise* a fee, should be construed into an *intention to devise* a fee. Until the statute of 1834, it was not the rule to hold a fee to pass under a devise of land, unless there were words showing a contrary intention; if it were, why was that statute passed? 13 Wend. 578; 11 Mass. 528. The word *land* denotes the object of the testator and not the *interest devised.* 6 Bin. 97; 17 Johns. 221.

D. S. BELL and G. SWAN, for defendants:

Insisted that the devise to Elijah Berry passed to him a fee in the land. That the statute of Ohio (29 Ohio L. 242), makes no difference between the bequest of personal and a devise of real estate. "Property of every description may be devised, and no particular words are necessary to create a fee. The intention of the testator, to be gathered from the whole instrument, is the polar star in construing wills, aided by the application of common sense, to the disregard of mere technicalities. By the application of this rule, and upon authority, this devise will be held to pass a fee. 2 Mass. 58; 11 Mass. 528; Walker's Am. Law, 343; Wil. Conn. 745; Story's Ch. 404; 8 Ves. 608; 1 Wash. 96, 100; 1 Doug. 341; 2 L. Raym. 1324; 1 *Bro. C. 437; 1 Wils. 333, 334; 3 Term, 359; [367 1 Term, 411; 5 Burr. 2638; 8 Term, 9; 6 Mod. 107; 7 East, 259; 2 Wils. 142, 143; 3 Burr. 1541; 1 Cowp. 355; 6 Johns. 190; 4 Kent's Com. 520; 4 Mon. 100; 17 Johns. 281; 4 Day, 371; 3 Des. 80, 168, 249; 2 Ohio, 306, 110. The act of March, 1834, (32 Ohio L. 41), has adopted the true rule, that the estate shall be absolute in the devisee, without words of limitation to make a less estate. That act was passed to prevent the litigation that would arise without it.

Judge GRIMKE delivered the opinion of the court:

There is a clear distinction between a will and a deed in regard to the words which are necessary to carry a fee. The rigid rules of interpretation which are applied to the last have never been considered applicable to the former. The circumstances under which a will is generally made, and the necessity of consulting the intention of the devisor only, have long since relieved devises from the strict rules of construction which are applicable to deeds. Nevertheless, some rules have been established, even in regard to wills; and these rules profess to consult, in the best possible man-

ner, the intentions of the testator, as gathered from the whole will. Thus the word *heirs* is not necessary to carry a fee, but any words which signify an intention to convey the whole interest of the testator are sufficient. Thus a devise of all my estate, all my interest, all I am worth, all my right, all my title, are sufficient to create an estate of inheritance. The general doctrine is, that if the expressions made use of, denote only a description of the estate, and no words of limitation are used, then only an estate for life passes; but if they denote the quantity of interest which the testator possesses, then a fee passes. In the case of Hogan *v.* Jackson, Cowp. 299, the testator devised to his mother all the remainder and residue of all the *effects*, both real and personal, which he should die possessed of, and the question was, whether she took a fee in the fee simple estate of the devisor? Lord Mansfield said, "the natural and true meaning of real effects, in common language and speech, is real property;" and he decided that the testator intended that his mother should take the whole of his property. In Huxtess *v.* Brooman, 1 Br. Ch. 437, the devise was to three persons, "all I am worth," except $20. The chancellor held that these words, without any others of larger signification superadded to them, were sufficient to pass real as well as personal
368] estate. In Whaley and *others *v.* Jenkins, 3 Des. 80, there were no words of inheritance, and no word which had before been construed to carry a fee simple. The testator merely gave his two tracts of land, to be equally divided between his two sons, and these words were held sufficient to pass the fee. This was followed up by the cases of Clarke *v.* Mikell, and Waring *v.* Middleton, 3 Des. 168, 249, in which the principle of the former decision was reiterated and enforced. It was said with great force, that the act abolishing the right of primogeniture, and placing real and personal property on the same footing with personal, ought to change the rigor of the rules which require words of inheritance or perpetuity to pass a fee.

In Jackson *v.* Pearson, 17 Johns. 381, where the words of the will were "my property, after my debts are paid, I leave and bequeath," without any words to control and explain them, were held to pass the real estate of the testator in fee. A decision equally broad was made in Hungerford *v.* Anderson, 4 Day, 371, and in Morrison *v.* Semple, 6 Bin. 94, where the testator gave to his son-in-law "all his real and personal property," it wes held

that these words denoted the interest of the testator, and not merely a description of the subject devised.

These are some of the leading cases on this subject. A review of all the authorities, English and American, would show that the latter have gone much farther than the former in giving effect to the intention of the testator, and for a very good reason. In America, the law of primogeniture is universally abolished, real and personal property are placed more nearly on a footing with each other, and the heir is no longer a favorite with the courts. The necessity of naming the heirs of the donee, in order to pass the inheritance, was unknown to the Roman law. It was unknown even in England, before the Norman conquest, when the introduction of feifs first gave rise to the practice. The necessity for naming the heirs originated at a subsequent period, where the rulers of Gothic dynasties granted lands under condition of military service. These grants were sometimes made to the feudatory for life, and sometimes to his heirs. Whenever they were not specially named, the grant was only construed to be for life. Although this state of things in Great Britain has long since passed away, yet it has influenced, more or less, the interpretation even of devises. In America, we have always been relieved from this artificial system, and from all the consequences which have followed in its train, and I think that a court in Ohio *should, very naturally, be guided by the American, rather [369 than by the British authorities.

In the will before us, the testator devises to his son David one third part of *all* his land, and then he devises to his two other sons, Elijah and Joseph, each one third of his land, dropping the word "all." I should say that if the word "all" had been entirely omitted, that still the devise would have passed a fee in each instance. But can it be doubted that it was the intention of the testator not to die intestate of any part of his property. The word *all* used in the first instance, most clearly denotes this intention, and was only omitted in the devise to his two other sons, because it was very naturally deemed to be superfluous. I think, therefore, that Elijah took a fee under the will, and that the petitioners have no title as reversioners after the death of Elijah to demand partition of his proportion of the land, and of this opinion are a majority of the court.

Partition refused.

DAVID PATTY *v.* J. W. MANSFIELD.

When a third person claims goods levied by a sheriff on execution, and prosecutes his claim under sections 6 and 7 of the law regulating judgments and executions, such claimant can not afterward have an action of trespass against the sheriff for the same goods.

RESERVED in the county of Miami.

This is an action of replevin, and the declaration is in the common form, predicated upon the unlawful detention of the property therein described.

The defendant pleads:

1. The general issue.

2. "That defendant, as deputy sheriff of the county of Miami, by virtue of an execution issued from the court of Miami county, on June 27, 1837, in favor of Charles S. Wood and George L. Oliver, partners, etc., against Mercer B. Patty and William H. Iddings, he levied on the property in controversy as the property of Mercer B. Patty, one of the defendants named in said execution; that after the levy was so duly made, as aforesaid, David Patty, the present plaintiff, claimed said property as his, and at the instance and request of the said David Patty, a trial of the right of said property was had before David W. Thayer, Esq., a justice of the peace for Miami county, on July 8, 1837, according to the statute in such case made and provided, and such proceeding 370] *were then and there had in the premises; that by the verdict of the jury, duly sworn, they found that the right to said property was not vested in the said David Patty, and upon which finding, the said justice entered up his judgment according to the said statute, in favor of the said Oliver and Wood, for the cost of trial for the right of said property," concluding with a verification, etc.

To this latter plea there is a general demurrer.

THOMAS, for plaintiff, and LOWE, for defendant, submitted the case without argument.

Opinion of the court, by Judge HITCHCOCK:

The defense relied upon by the special plea in the bar in this case, is grounded upon sections 6 and 7 of the act of March 1,

1831, regulating judgments and execution. 29 Ohio, L. 101. And whether the defense is available depends upon the construction of those sections of the statute. Section 6 provides in substance, that if the officer having a writ of *fi. fa.* shall levy the same on goods or chattels claimed by any other person than the judgment debtor, it shall be the duty of the officer forthwith to give notice in writing to some justice of the peace of the county, setting forth the names of the plaintiff and defendant, and of the claimant; and, also, he is to furnish the said justice with a schedule of the property claimed. It is then made the duty of the justice to issue a writ of *venire facias*, directed to the sheriff or any constable of the county, commanding him to summon five disinterested electors of the county, to appear before said justice, at the time and place therein mentioned, to determine the right of the claimant to the property in controversy. The claimant is required to give two days' notice to the plaintiff in execution, or other party for whose benefit such execution was issued, of the time and place of trial, and to prove to the satisfaction of the justice that such notice was given.

In section 7, the oath to be taken by the jury so summoned is prescribed, and the judgment to be rendered on their finding. If the right of property is found to be in the claimant, judgment *shall be rendered in his favor against the plaintiff in execu- [371 tion for costs, and also that he have restitution of the goods and chattels claimed; but if, on the other hand, the right of property is found to be in the claimant, then judgment shall be rendered against him for costs. The section then is concluded by the following proviso: "That such judgment for the claimant as aforesaid shall be a justification to the officer in returning *nulla bona* to the writ of execution, by virtue of which the levy had been made as to such part of the goods and chattels as were found to belong to such claimant."

There is no difficulty in cases where the jury find the right of property in the claimant. It then becomes the duty of the officer to deliver to him the goods and chattels found to be his, and he will be protected against any claim on the part of a judgment creditor by a return of *nulla bona*. Thus far the statute is explicit. But if the right of property is not found to be in a claimant, the officer must of course retain it in his possession until sold in due course of law. As the statute does not specifically declare

that in such case the officer shall be protected, it seems to be supposed by the plaintiff, in the present case, that he may be subsequently subjected to an action at common law for the property, or to respond in damages for its value. We think, however, that such is not a proper construction of this statute. We suppose that in the enactment of this law the legislature had two objects in view. One was to enable an individual, whose property had been through mistake levied upon, to recover the possession in a summary manner. The other, and the principal, was to furnish protection to an officer of the law, who should make a mistake in the discharge of his duty. This latter object would not be effected, if, after a trial of the right of property and a decision against the claimant, the officer could still be subjected to an action at his suit. Besides, no person is bound to claim his property under this statute. He may at once commence his action at common law against the sheriff or other officer, and if he prefer the statutory remedy, he ought to be concluded by it, so far at least as the officer is concerned.

The proceedings under the statute, however, will not conclude the claimant so far as persons, other than the officer, are concerned. If the right of property is really in him, that right will not be destroyed by a levy and sale. He may pursue it in the hands of a purchaser at sheriff's sale, or he may, in a proper state of case, and in an appropriate action, proceed against the plaintiff in execution, or his agents, or any other person who may have improperly interfered.

The plea in the case under consideration, although somewhat 372] *defective in form, shows that the property in controversy was levied upon by execution; that it was claimed by the plaintiff; that at his request there was a trial of the right to the property, which was found not to be in the claimant, and judgment accordingly. We think the facts as substantially set forth constitute a defense to the action.

The demurrer is therefore overruled, and the cause continued and remanded to the Supreme Court of Miami county for further proceedings.

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BANJAMIN MOORE *v.* A. P. ADAMS AND JACOB NEWKIRK.

A conveyance of land made in consideration of compromising alleged causes of action for slander and malicious prosecution, and also in consideration of forbearing to urge a prosecution for perjury, is a contract executed, and not to be set aside in equity upon allegations that there was no legal foundation for such suits or prosecution.

IN chancery, from Seneca county.

The bill alleges, that in May, 1831, a prosecution for forgery was instituted by the complainant against the defendant Adams, before a justice of the peace, and that, on examination, Adams was discharged, owing in a great degree to the skill and ability of an attorney employed by him. That immediately after the discharge, the said attorney informed the complainant, that Adams was about to commence criminal proceedings against him for perjury in the testimony he gave on said examination, and that he had also been employed to commence suits for Adams, against the complainant, for slander, and for malicious prosecution; that the expense of defending said suits would amount to $500; and it would be much better for him to settle with Adams, and prevent such proceedings. That said attorney, the better to impose on his credulity, secure his confidence, and deprive him of his legal rights, assured the complainant in the most solemn and impressive manner, that although he could not assist him in defending the prosecution for perjury, nor defend the other suits for him, he was under the strongest moral obligation to tell him the truth, and he assured him of his sincerity; the justice refused to advise the complainant what he should do; he was without counsel; that an affidavit was prepared, and the attorney said if the prosecution was once commenced, it must take its course, and then was the time to settle all the difficulties, to prevent further proceedings. A warrant was then prepared, and the declaration made, that no further delay would take place.

The complainant asserts that although *perfectly innocent of* **crime*, he thought the pubic mind might be prejudiced [373 against him, if the threatened prosecution and suits were commenced; that he was embarrassed and dejected by the circumstances thrown around him, and thus, bewildered as he was, he agreed to *compromise* with Adams, and pay him $100 in satisfac-

tion of all their difficulties, upon his (Adams') assurance that he would do all in his power *to prevent any future investigation*, and the declaration of said attorney, that such compromise would save complainant from inevitable ruin, degradation and probable imprisonment in the penitentiary. That to secure the payment of said $100 dollars to Adams, he executed a deed to him for a lot of forty acres of land in fee simple, and took from him a writing, obliging to reconvey the land upon the payment of the money, within a year, and took a discharge from said pretended grievances.

The bill further states that a prosecution was afterward instituted against the complainant for perjury, upon said examination, from which he was duly discharged; and, that soon after, learning that said Adams was about to convey said land to his co-defendant Newkirk, he informed Newkirk of all the foregoing circumstances, warned him not to purchase, as he intended to take measures to recover the land back. Yet the said Newkirk took a conveyance for said land, and now claims to hold the legal title. The bill prays to have said conveyances set aside, and to have the land reconveyed to the complainant.

Adams, in his answer, admits the prosecution against him for forgery, instituted by complainant, and prosecuted with great rigor; that he employed counsel to defend him; that he designed to commence suits for malicious prosecution, and for slander; and so told complainant. Admits the compromise of those suits, and the conveyance to him of the forty acres of land, and his sale and conveyance to Newkirk; he admits something was said about a prosecution for perjury, but not until after the deed was executed to him; denies all knowlege of any influence used by his attorney to induce the complainant to settle, and alleges the proposition for a settlement came from the complainant, was accepted with reluctance, and that no agreement to compromise any criminal prosecution formed any part of the consideration of said deed. Newkirk admits his purchase of Adams with full knowledge of the condition for redemption, but he avers his purchase was *bona fide*, without notice of the circumstances attending the conveyance to Adams, detailed in the bill. There is a general replication

374] *and proof of the execution of the deed to Adams under the circumstances set out in the bill; also, that Newkirk had full

knowledge of all the material facts when he took the conveyance, and of the agreement to stifle a criminal prosecution for perjury.

RAWSON, SMITH, and CHAPIN, for complainants, contended:

1. That the deed to Adams was a mortgage only.

2. That it was obtained under undue influence, and by threats, sufficient to induce equity to set it aside, as illegal and against public policy. They cited 1 Mad. Ch. 308; 1 Bridg. M. 445; Powell on Cond. 20; 2 Johns. Ch. 35; Amer. Ch. Dig. 204; 3 Cowen, 571, 572; 2 Kent's Com. 466, 467; 4 Ib. 464; 8 Johns. 198; 1 Ch. Cont. 236.

3. That Newkirk purchased while Moore was in possession, and before the deed to Adams was absolute. 1 Johns. Dig. 315; 2 Bridg. Ind. 365.

4. That Newkirk paid nothing, but by his own showing took the conveyance to satisfy a debt due him by Adams, and if the deed be set aside, his debt will remain as before. 3 Cowen, 577-579.

5. That the deed to Adams was obtained by fraud, and from a party under duress, and the parties are not in *pari delictu.*

No argument was submitted for the defendants.

Judge WOOD delivered the opinion of the court:

The complainant seeks relief, because he was compelled by duress to make the deed to Adams. Is he right in this assumption? We incline to a different opinion. Lord Coke says, "that for menaces, in four instances, a man may avoid his own act: 1. For fear of loss of life; 2. Of member; 3. Of mayhem; and 4. Of imprisonment. 2 Bac. Ab. 156, 157. The complainant was in no fear of life, or member, or mayhem—the mere threat of consequential imprisonment does not constitute duress. There must be actual and unlawful imprisonment to constitute duress, and the deed given as a consideration for the discharge. "It is not accounted duress of imprisonment, but when either the imprisonment or the duress that is offered, in prison, or at large, is tortious and unlawful; for *executio juris, non habet injuriam.* Ib.

2. The complainant seeks relief because the consideration of his deed was, in part, the agreement not to prosecute him for perjury. We think this ground, also, unavailable for him. The agreement is unlawful, in which both parties are concerned, and *they stand in *pari delictu.* It is *contra bonos mores,* and [375

good policy requires the court to leave the parties as it finds them, and not corrupt itself by interfering between a *corrupt* vendee and an equally tainted vendee. 4 Ohio, 418; 7 Ohio, 77; 2 Kent's Com. 366; 2 Stark. Ev. 87. These cases are all of executory contracts, it is true, but this court has determined that when a deed was delivered, upon an agreement analogous to the one set up in the bill, the contract was *executed*, and that the court would leave the parties to the full enjoyment of the fruit of their iniquity without interference. It is said, however, that that was an action *at law*, and this a case *in equity*. We know of no distinction in the application of these rules in the one or the other court.

The bill is dismissed with costs.

JONATHAN EDWARDS *v.* WM. L. KNIGHT.

The election of a prosecuting attorney may be contested before the court of common pleas; but the contestor must show in his notices of contest that he was a candidate or elector at the election.

CERTIORARI to the common pleas of Trumbull.

The record shows that at the November term of the court of common pleas, in the year 1837, Edwards produced in court a copy of a notice duly served upon Knight, that the election of Knight as prosecuting attorney would be contested by Edwards, and that depositions would be taken to that end, at certain times and places therein mentioned. Upon this the contest was docketed, when Knight, by his attorneys, moved to quash the proceedings for the following causes:

1. That the law makes no provision for contesting the election of a prosecuting attorney.

2. That no notice of the intention to contest was filed with the clerk within twenty days after the election.

3. That it does not appear from the notice that Edwards was an elector or candidate.

4. That the court had no jurisdiction.

Edwards then produced a certificate that it appeared from the

poll-book of the township of Youngstown, that he voted at the election.

The court of common pleas quashed the proceedings, and taxed the costs against Edwards. To reverse these orders, this *certiorari* is prosecuted.

*Crowell, for Edwards: [376

Cited the laws of the state, and contended that the election of prosecuting attorneys might be contested under the general law for contesting elections.

G. Tod and Hoffman, for Knight.

Judge Lane delivered the opinion of the court

The act to regulate elections (29 Ohio L. 44) prescribes the general mode of conducting them. Section 43 gives to any candidate or elector the power to contest the rights of senators and representatives to their respective seats, prescribes the manner of taking testimony, and for submitting the issue to the proper branch of the general assembly. Section 64 prescribes the same method in contesting the rights of those elected to county offices, except that the matter is to be determined by the court of common pleas, to whom it is to be sent within thirty days. The act to provide for the election of prosecuting attorneys (31 Ohio L. 13), directs their "election to be held in the same manner that other state and county officers are to be elected, under the provisions of the act to regulate elections." The question first presented is, whether the right of contesting attaches to the prosecuting attorneys as well as to other county officers? The affirmative is our opinion. The mode of contest is a part of the machinery by which the elections are regulated, and the right to office investigated and declared, as necessary as any step in the proceedings; and the adoption of the manner of holding elections of county officers in the last statute, is an adoption of all the incidents by which their rights to office become mature.

The second objection, that notice was not duly filed with the clerk, is not true in fact; the election being held in October, and the proceedings filed on the 21st of the same month.

The third objection, that Edwards shows no right as candidate or elector to contest the seat, seems to us well taken. The candidate is not presumed to know all the electors in his district, and he is bound to respond to none, except those who show in the no-

tice the right to question, which forms the basis of the proceeding. The contestor offers proof that he was an elector, but we think the right should appear on the record. This opinion is in analogy with the settled course of decisions in this court under the bastardy act, requiring the facts, the mother is an unmarried 377] *woman, and resident in Ohio, to be set forth in the complaint.

The order of the common pleas, quashing the proceedings, was right; but no authority is perceived for taxing the costs of the proceeding against the contestor.

The judgment of the court of common pleas is in all things affirmed, except as to the taxation of costs, in which respect it is affirmed.

NATHANIEL MASSIE'S HEIRS *v.* ISRAEL DONALDSON

A bill brought against heirs on their ancestor's contract to convey lands, must make the personal representative party defendant.

Process in chancery should be served on minor defendants, and the case must be established by proof, even on default for answer.

BILL of review to reverse a decree of the court of common pleas of Highland county, for errors on the face of the proceedings. The following abstract shows the state of the case:

Israel Donaldson (defendant in review) filed his bill at the June term of the court of common pleas, 1816, against the heirs of Nathaniel Massie, deceased, at that time infants, to obtain the conveyance of a tract of land, situate in Highland county, which, as was alleged in said bill, Nathaniel Massie, in his lifetime, had given his penal bond to convey to said Donaldson.

The bill charges that said Massie in his lifetime, and his heirs since his death, had not conveyed said tract of land, and prays the heirs, by their guardian, may answer the bill, and that a decree may be rendered, conveying the said tract of land to said Donaldson, so as to vest in him the legal title, if the heirs of said Massie have the title thereto; but in case the defendants, the heirs, have not the title to said tract of land, and are incapable to

assure the title, or invest him with such title, then to decree him such compensation or sum in damages, or otherwise, as may be assessed by a jury, or as may to the court seem just and proper.

At the same term, on the motion of the *complainant, Donaldson, by his counsel*, it was ordered by the court that William Creighton, jr., of Ross county, be appointed guardian for the defendants, etc., to answer, etc., subpena to issue accordingly, etc.

On July 4, 1816, subpena issued to the sheriff of Ross county, to summons the said William Creighton, jr., to answer for the infant heirs, etc.; subpena returned "summoned."

*At the March term, 1817, it was ordered that the defend- [378 ants answer the bill within sixty days.

At the February term, 1818, rule was entered, on motion of the complainants, that the defendants answer the bill within sixty days from the rising of the court, etc.

At the May term, 1818, the defendants having failed to appear and answer the bill, although ruled so to do, it was decreed that the complainant recover the sum of $1,575 and costs, to be levied from the assets which have or may descend to the heirs, as it appeared to the court that they could not convey the tract of land, etc.

LEONARD and MASSIE, for plaintiff in error, made the following points, and cited the authorities annexed:

1. That a decree was rendered for the recovery of the sum of $1,575 and costs, whereas no decree should have been rendered for the recovery of money against the defendants, because the representatives of the personalty of Massie's estate were not made a party, and the situation and disposition of the personal assets ascertained before a decree for the payment of money was rendered against the real assets in the hands of the heirs. 2 Story's Com. 536; 1 Ves. 211; 4 Johns. Ch. 638; 5 Ohio, 555.

2. That the said defendants, although minors, did not appear by guardian or next friend.

3. That no person accepted the guardianship *ad litem* of said defendants, although minors, nor acted as guardian *ad litem* for them in the said suit in chancery.

4. That no answer was filed or made by the said defendants, or by any guardian in the said suit.

5. That the decree was taken *pro confesso* against the said defendants without any plea, answer, or demurrer.

6. That in the rendition of the decree, no day was given the defendants after they attained their full age, to appear and show cause against the decree. 1 Har. Ch. Pr. 425.

7. That said decree was taken without evidence to support the same.

8. That the defendants were not summoned to answer the said bill, but only William Creighton, jr., their guardian, and that neither the defendants, nor the said William Creighton, appeared or answered, pleaded, or demurred to the said bill.

The 2d, 3d, 4th, 5th, and 8th errors relate to the erroneous pro-
379] ceedings *had in the case at the time the bill was filed, and before and at the rendition of the decree, the heirs of said Massie being minors. 1 Har. Ch. Pr. 474; 2 Mad. 202; 8 Pet. 144.

No argument was submitted for the defendants.

Judge GRIMKE delivered the opinion of the court:

This is a bill of review to reverse the decree of the court of common pleas, for errors apparent on the face of the proceedings and decree.

N. Massie, in his lifetime, had contracted to convey a tract of land to the defendant; but failing so to do, the defendant filed a bill against his heirs, praying in the alternative for a conveyance, or a compensation in damages. None of the defendants, then infants, were served with process; but a guardian *ad litem* was, on the motion of the complainant, appointed for them. This guardian never answered, and a decree *pro confesso* for $1,575 was rendered against the heirs. The administrator of N. Massie was never made a party; but on the decree thus rendered, an execution issued and was levied on land descended to the heirs.

The first great error which seems to have been committed, was in not making the personal representative of N. Massie a party. As the personal property is the fund which is primarily liable for the payment of debts, as well after death, as during the life of the debtor, the administrator in whom it is vested, and who is a trustee for those who are ultimately to receive the benefit of it, is an indispensable party before the court. Thus, in Ashhurt *v.* Eyre, 3 Atk. 341, to a bill for a discovery of assets, a plea that the administrator was not a party, was adjudged good. And in Gregory *v.* Forrester, 1 McChord's Ch. 318, it was held that a suit could not be maintained against heirs for the purpose of subjecting

assets in their hands to the payment of debts, unless an administrator was appointed and made a party, although the plaintiff himself would have the right to administer. There are, to be sure, exceptions to the rule. Thus in Pluxtell *v.* Penton, 2 Atk. 51, it was decided that a suit might be instituted against heirs for the discovery of real assets, upon suggesting that the personal representative was contesting in the ecclesiastical court. In Massachusetts, a suit may sometimes be maintained against heirs alone. 12 Mass. 399. But it is by *express statute that [380 this is permitted, and is an evident departure from the regular mode of proceeding.

In England, heirs are liable to be sued on the bond debts of their ancestor. This is because such debts bind the land, and constitute a lien upon it. The heirs are, therefore, liable in the first instance. But even in that country an heir is sometimes entitled, *in chancery*, to stand in the place of a bond creditor against the personal estate of the intestate.

The case of a vendee filing a bill for the purpose of subjecting *the land sold* to the payment of the debt, might seem to form an exception to the general rule, which requires the administrator to be made a party. The vendee as well as the vendor has a lien on the land; the latter for the unpaid purchase money, and the former for the purchase money prematurely paid. But even admitting that this was a bill of that character; yet our administration laws, after the death of the vendor had accrued, would not recognize this lien, without an account of the personal estate being previously taken.

To sustain these proceedings would be indeed to subvert the whole design of our administration laws, which is to subject the personal property, in the first instance, to the payment of the debts of the intestate. It would be equally contrary to the principle, that all persons interested, and against whom a decree might be rightfully rendered, should be made parties to a bill in chancery. This rule is so strict in its application, that although it has been held that a purchaser under a decree shall not be affected by error in the decree, yet it has also been held that *even he* ought to see that all proper parties to be bound are before the court, and that he does not take a title which can be impeached *aliunde*. Bennet *v.* Hamill, 2 Seg. L. 556.

The personal representative of N. Massie should have been a

party to these proceedings, and an account should have been taken of the personal property, in which event the sale of the land *on execution* may have been rendered unnecessary. Another error assigned is, that there was no service upon the defendants. There is no doubt what the English practice is. Infants, as well as other defendants, are served with the subpena, and the former are afterward brought into court, in order to receive their answer. The rule has, in very particular cases, been departed from. Thus in Smith *v.* Marshall, 2 Atk. 70, where a mother secreted the infants, so that they could not be served, a service upon her was 381] declared to be good service. And in *Thompson *v.* Jones, 8 Ves. 141, the rule appears to have been still further relaxed, for on a motion that service on the father-in-law should be deemed sufficient, the chancellor said that the register had furnished him with *several orders* that service upon the mother should be good. These exceptions, however, proceed upon the very principle on which the rule requiring service on the infants is founded. Service on them would be very absurd, if it were not intended by that means to apprise their relations of the institution of a suit, and thus to put it in the power of those most deeply interested in their welfare, to protect their interests.

In Ohio, it has not been the general practice to make service on the infants. A very loose mode of doing business has universally prevailed. This is greatly to be regretted, since as much mischief might be created by returning to the old and regular practice, as has been occasioned by the original departure from it. The practice of every court may be said, sometimes, to constitute the law of the court; and, perhaps, even this practice may be entitled to respect, if it is the creature of inveterate usage. But it is unnecessary now to decide this point, as there are so many other errors in these proceedings.

Although a guardian *ad litem* was appointed, no answer was ever filed by him, and the decree was taken *pro confesso*. It has been doubted whether a decree can regularly be taken against an infant, even upon the answer merely. An answer of infants by their guardian is a pleading only, and not an examination for the purpose of discovery. But however this may be, it is clear that where no answer has been put in, a decree can not be rendered against infants by default. Mills *v.* Dennis, 5 Johns. Ch. 97, but

the plaintiff must prove his case. This is a settled principle both in England and America.

The proceedings in the original suit, then, are thoroughly defective. The defects disclosed are, some of them, so gross, so manifestly prejudicial to the interests of those concerned, that we would not be authorized to say that they were excusable, even upon the old maxim, that common error makes the law. There is no alternative but to reverse the decree.

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*Robert Clark v. Wm. B. Hubbard. Original Bill.— [382
Wm. B. Hubbard v. Robert Clark. Cross-Bill.

In a bill, under the statute, for quieting possession, the complainant must set forth and prove actual possession.

Conveyance decreed fraudulent, upon the proofs in the case on a cross-bill to quiet possession.

These cases came before the court, at its last term, in Guernsey county, on bills, answers, exhibits, and testimony, and were reserved for decision in this court.

The complainant, Robert Clark, filed his original bill in the court of common pleas in Guernsey county, on November 20, 1834, in which he states that on December 24, 1824, John Clark, by deed duly executed, conveyed to him 200 acres of land, in the first quarter of the second township, first range of military land in Guernsey county, for the consideration of $400, which deed has been duly recorded, but through mistake, was not recorded until September 24, 1831. That the price agreed upon for said land was $400, for $195 of which, the said John Clark was at the time indebted to him on note and book account, and that the balance of the purchase money has been since paid. That he immediately took possession of the land, and has remained in possession ever since, and still is in possession.

He further states that the defendant, William B. Hubbard, about March 24, 1826, as attorney for the judgment creditor, procured an execution to be issued on a judgment, before that time rendered in Belmont county, against the said John Clark, caused the same

to be levied on the said land, and about February 28, 1837, became the purchaser at sheriff's sale; and that the said Hubbard threatens to dispossess him of said land, etc. It is further charged that at the time the execution was issued, and the levy and sale made, Hubbard had knowledge of complainant's interest in the land. The prayer of the bill is, that the complainant may be quieted in his title, that Hubbard may be decreed to release, etc., and also for general relie

On April 2, 1835, Hubbard answered this bill. In his answer, he admits the purchase at sheriff's sale, and avers that the land was soon after transferred to him on the books of the auditor of the county for taxation. He denies that the complainant has any title to the land, and charges that if the complainant has any deed, the same is fraudulent and against law. He denies that he had any notice of complainant's claim, until after his purchase at sheriff's 383] sale. He denies that the complainant has, or *ever had the possession of the land in controversy, but avers that immediately after the confirmation by the court of the sheriff's sale, which was at the April term, 1827, he took possession of the land himself, and has been in the uninterrupted possession ever since. No deed was executed to him by the sheriff until March 31, 1835.

The transcript of the record of judgment, executions, returns, orders of court, as well as the sheriff's deed, are referred to, and made part of the answer.

To this answer a replication was filed, and testimony subsequently taken.

On October 8, 1835, Hubbard filed his cross-bill. In this he states that he is the legal owner, and is in possession of the land in controversy. He charges that the deed under which Robert Clark claims title, and purporting to have been made by his brother, John Clark, was voluntary, fraudulent, and void at law, as against creditors and subsequent purchasers; that the said deed was not recorded until long after his purchase at sheriff's sale, and long after that sale had been confirmed by the court. He refers to his answer to the original bill, and the exhibits therein made, and makes them exhibits in this bill. He further alleges that the said Clark is about to dismiss his original bill, gives out in speeches that he has the better title, or some kind of title, by which he is disquieted, etc.; and prays that his bill may be considered, as well a cross-bill as a bill for relief, that he may

be quieted in his title, and that the said pretended deed of the said Clark may be delivered up to be canceled, etc.

Robert Clark, in his answer to this cross-bill, refers to his original bill, and makes it a part of his answer, and avers that the facts therein stated are true, except as to the $195 therein stated to be a part of the price of the land. He refers to an account filed with the answer as showing the true state of the dealings between him and his brother John, taken from his own books; alleges that a note referred to in said account was given up to John Clark, and that the last payment on the account exhibited was made at the time of settlement, and was an even payment for the land of $30; denies all fraud, and insists that the purchase was *bona fide*, etc. This answer is not sworn to.

There was some parol evidence in the case in addition to the papers exhibited; but as this evidence is commented upon in the court, it is not here stated.

*COWAN, for Hubbard, made these points: [384

1. He insisted that under the chancery act of this state, this court had jurisdiction to grant to Hubbard the relief sought.

2. That the facts of the case proved that the deed from John to Robert Clark was fraudulent as against creditors, and therefore void as to Hubbard, who purchased at sheriff's sale on an execution in favor of one of those creditors.

3. That deed never took effect, not being delivered.

4. Admitting the deed not to be fraudulent as to creditors generally, yet it would be fraudulent in law as to Hubbard, he being a purchaser without notice, and the deed not having been recorded at the time of his purchase, nor within six months after its execution.

He cited 22 Ohio L. 220; 29 Ohio L. 348; 4 Kent Com. 173, 2 ed.; 2 Johns. Ch. 369.

HARPER and PECK, for Clark, insisted:

That the deed from John to Robert Clark was made in good faith, and for a *bona fide* consideration.

That although Hubbard might not have had notice at the time he made the purchase, yet that he had notice before he received his deed, or paid the purchase money, and that such notice would, in equity, have the same effect as if he had received it prior to his purchase.

That if the deed of Clark was not good as a conveyance, not

being recorded, it would operate as a contract to convey, vesting in Robert Clark a perfect equity, of which he could not be divested by the sheriff's sale, that sale being only of the interest of John Clark still remaining in the land.

They cited 3 Ohio, 527; 1 Ohio, 258; 1 Johns. Ch. 288; 2 Ib. 158; 3 Ib. 345; 2 Atk. 397.

Judge HITCHCOCK delivered the opinion of the court:

The original bill in this case was filed in accordance with section 14 of the act regulating proceeding in chancery. 29 Ohio L. 81. That section provides that "any person having the legal title and possession of lands may file a petition against any other person setting up a claim thereto; and if the complainant establish his title to said lands, the defendant shall be decreed to release his claim, and pay the complainant his costs, unless the defendant in his answer shall disclaim all title or claim to such 385] lands, and offer to give such release to the complainant, *in which case the complainant shall pay to the defendant his costs, except for special reasons the court shall otherwise decree." By this section of law a complainant, in order to sustain his bill, must show that he is vested not only with a legal title, but with the *actual possession* of the land in controversy. This the complainant, Clark, has alleged in his bill, and has attempted to prove by the testimony. But in this there is an entire failure. Even admitting that he has a legal title under the deed referred to in the bill, the evidence shows conclusively that he was never in possession of the land, but that, on the contrary, Hubbard, by himself or tenants, has been in possession since the confirmation of the sale by the court of common pleas in March, 1827. Since that time Hubbard has paid the taxes, as well as the arrearages of taxes previously due. Clark, then, does not make a case for the interference of this court.

This lead us to examine the case made by the cross-bill. And here we have no hesitation in saying, that Hubbard makes a case for relief, unless his title is postponed to that of Robert Clark. He is in the *actual possession* of the land, and no valid objection can be made to his title, unless it is on account of Clark's deed. The purchase at sheriff's sale appears to have been in accordance with law; the sale itself was confirmed by a court having jurisdiction; and the deed was executed in pursuance of an order of that court.

The first and important question to be considered, is whether the deed of December 20, 1824, from John to Robert Clark, was *bona fide*, or whether it was fraudulent as against creditors, and consequently void as to such creditors and those connecting themselves with them. The testimony upon this point is not multifarious. It is principally introduced by Clark himself, but still it is quite satisfactory and conclusive. It consists of the answer of Robert Clark, the deposition of John Clark, certain letters passing between John and Robert Clark, a letter of Stephen Colwell admitted as evidence, the deed itself, and a transcript of the judgment and execution, under which Hubbard made his purchase.

This transcript of record shows that a judgment was recovered by the administrators of one Lynn against John Clark at the June term of the court of common pleas of Belmont county, 1819, on which sundry executions were issued to different counties and small sums made. On April 15, 1826, an execution *was is- [386 sued on this same judgment, directed to the sheriff of Guernsey county, which was levied on the land in controversy, and the land subsequently sold. From this, it is apparent that to the amount of the balance due on this judgment at least, John Clark was indebted on December 20, 1824, the day of the date of the deed. Whether he was indebted beyond this does not appear in the testimony.

Robert Clark, in his answer to the cross-bill, or rather in his original bill, which he makes a part of this answer, says, that the consideration for this deed was agreed at $400. That a part of this $400 was made up of a note and account in which John Clark was at the time indebted to him, and on which was due $195, and that the balance has been paid to John Clark since the said deed was executed. In the answer, he says he was mistaken as to this $195, but does not point out the manner in which the mistake occurred. He refers to an account filed with this answer as showing a true statement of the dealing between himself and brother John, and says, that upon settlement it was found that the land had been more than paid for by $30. This account appears to have been rendered and the settlement made in 1832, and there is one charge for goods in October, 1831, amounting to $90.

The deed bears date December 20, 1824; is acknowledged January 2, 1825, and recorded in 1831.

John Clark testified, that "he is a brother of Robert Clark; he

is acquainted with the land which is the subject of this suit; he owned it once." He then refers to three letters, one from Robert to himself, dated June 10, 1822; and two from himself to Robert, dated, one March 17th and the other March 28, 1823. He says that there were other letters, two of which he recollects; but does not state when written, or what they contained. That he heard that his brother was sick, not likely to live, and that he took the deed with him and went to Brownsville, where his brother resided. That the deed was executed in Belmont county before he went to Brownsville. That he offered the deed to Robert, who requested him to bring it to Ohio, and have it recorded. That when he returned to Ohio, *he handed it to Stephen Colwell, Esq., to have it recorded*, who through some neglect or mistake did not get it recorded. That afterward it came into his possession with a bundle of papers which Colwell had left in the hands of Mr. Peet. Between 1814 and 1822, he 387] *had dealings with Robert. When Robert rendered his account, which was between 1820 and 1822, he, John, fell in debt between $300 *and* $400, *without interest; with interest, more than* $400. Included in said account was a promissory note, which he had forgotten, but which he recognized when he saw his handwriting thereto when it was presented. The note was dated in 1814. *The consideration for the land was this account and interest, but considerable interest was thrown away.* Shortly after deponent received the deed from Peet, a son of Robert called and took it to get it recorded. Afterward, deponent received a power of attorney and $30 to attend to the land. He thinks that in 1824 or 1825, Hubbard inquired of him if he did not own land in Guernsey county, and he replied that he did not that was clear of dispute. That after Hubbard purchased, he told him, Clark, of the purchase, and that he replied that he had no right to buy, because he knew that he, Clark, did not own the land. On cross-examination, he says that *he received the note referred to in* 1832, *which was the first time he had seen it after its execution. Does not know that Robert furnished him with but one statement of the account, which was in* 1832, showing that an amount of interest was due which he threw away. The interest would make the account near $500. Does not recollect whether the deed was written after the message came from Brownsville. Robert Clark was not able to attend to business after deponent got to Brownsville, but was able to converse with him and tell him what

to do. Deed was not delivered. Robert told deponent to take it and have it recorded. No accounts were looked over at the time; Robert was too unwell. Had no further communication with Robert about the land until the time the power of attorney came on, which was between 1830 and 1832. William B. Hubbard was attorney for deponent in the case in favor of Lynn's administrators. Deponent knew that he was indebted to his brother Robert, but had forgotten the note.

I have been thus particular in stating the testimony of this witness, because, extraordinary as it certainly is, it is the principal testimony relied upon by Robert Clark to sustain his answer and his case.

Colwell's letter is of no further importance than it goes measurably to contradict the testimony of John Clark. Clark states that he handed the deed from himself to Robert, to Colwell to *get it recorded, Colwell states that he has no recollection [388 of ever having seen the deed, or of ever having had it in possession.

The copy of record, in the case of Lynn's Admr's *v.* Clark, shows that Hubbard was the attorney of the plaintiff, and of course Clark is at least mistaken in saying that Hubbard was his attorney in that case.

The deed bears date on December 20, 1824, and is acknowledged on January 5, 1825. Still, John Clark does not remember whether it was written before he received information of the sickness of his brother or not. If written afterward, and if upon its date it shows the time when written, he would have been in no great haste to visit a sick and dying brother, as he must have delayed fifteen days between the signature and acknowledgment of the deed, both of which purport to have taken place in the county of Belmont. These circumstances serve to raise a suspicion that the memory of this witness is, to say the least of it, somewhat treacherous.

But it may be well to examine this evidence a little more particularly. Robert Clark, in his original bill which constitutes a part of his answer to his cross-bill, says that the whole consideration for this land was $400; $195 of which was due from his brother to him on note and account at the time the deed was executed. The witness, this same brother, says that the indebtedness was between $300 and $400, including the interest more than $400, and that a part of the interest was thrown away. A part of this indebtedness was by note, executed by him in 1814, and which he had forgotten un-

til it was shown to him, when he recognized his signature. This indebtedness was, as the witness says, the consideration of the deed. And this amount of indebtedness was ascertained when the account was rendered and a settlement made. Now here is a material discrepancy between the answer and testimony. In the answer, Robert Clark does not claim that his brother owed him but $195 when the deed was executed, but the brother insists that it was more than $400. Robert claims that this indebtedness constituted but a part of the consideration. John insists that it constituted the whole.

Robert Clark is careful to state that this note, so often referred to, had been given up; that an account had been rendered, and settlement made. It becomes important to inquire when this took 389] *place. In his examination in chief, John Clark says that this account was rendered between 1820 and 1822, and that the note constituted a part of the account, and a part of the consideration of the land. On his cross-examination he says he does not know that his brother ever furnished him with but one statement of the account, which was in 1832, and at the same time the note was given up to him, which he had not until then seen after it was executed, and had entirely forgotten its existence. If we are to credit this witness, a note which he did not know was in existence until 1832 constituted a part consideration of a deed which he executed in 1824!

This witness further states that from the time the deed was executed until between 1830 and 1832, there was no further communication between himself and brother about this land. This is a little extraordinary if there had in fact and truth been a *bona fide* sale, when it is considered that the only pretended consideration was an open and unsettled account, and which was not closed until 1832.

Another circumstance is worthy of remark: If Robert Clark became the purchaser of this land, it would have been reasonable for him to have paid the taxes. But it was not done. They were in arrears, and paid by Hubbard after his purchase at sheriff's sale.

But it has been urged in argument that the letters exhibited in evidence, furnish presumptive proof of the fairness of the transaction. In these letters, it is true, something is said about land, but this is not the principal subject of correspondence. Nor is

there anything in them approximating to a contract. The last of them was written in the latter part of March, 1823, almost two years before the deed was made. And there is no evidence to show that there was anything further passed between the parties respecting land until the deed was executed.

There is one more circumstance worthy of consideration: In 1824 or 1825, Hubbard inquired of Clark, according to Clark's testimony, whether he had not land in Guernsey county. Clark replied, not that he had no land, but that he had none which was not in dispute. At this time Clark must have known that he had not paid up the judgment to Lynn's administrators, and he must have known, too, that Hubbard was the attorney for the plaintiffs, although he might have forgotten it when he gave his deposition. About this same time, John Clark makes this deed to his brother Robert, lying, as he would have us believe, at the point of death, *and then rests quietly for eight years before he ascertains [390 whether he is indebted to that brother to the extent of the estimate value of the land or not.

Taking all these circumstances into consideration, the court can have no doubt that this conveyance was made for the purpose of defeating creditors of their dues. It is, therefore, fraudulent and void as to those creditors, and as to Hubbard, who purchased at sheriff's sale, under a judgment in favor of one of those creditors.

Such being the opinion of the court, it is unnecessary to examine the other points made in the case.

Hubbard is entitled to a decree.

E. AND W. HULL v. R. JEFFREY ET AL.

Assignments of property giving preference to creditors may be made in good faith, under proper circumstances, notwithstanding the statute of 1835 upon that subject.

IN chancery from Marion.

The plaintiffs are judgment creditors of R. and S. Jeffrey, and

claim the benefit of an assignment of their property, made by them to Ustick and others, their trustees.

On May 3, 1837, R. and S. Jeffrey assigned to Ustick, Doty and Shunk, all their property, real and personal, enumerated in a schedule, in trust to sell, collect the avails, and apply them as follows:

1. To pay the expenses of the trust.
2. To pay certain enumerated debts due to banks, upon which others are liable with them as sureties.
3. To pay all other debts owing by them.
4. To pay any surplus to the makers of the trust deed.

S. FINCH, for complainants.

S. BRUSH, for defendants.

Judge LANE delivered the opinion of the court:

This case was reserved to settle a single point, depending upon the construction of the first section of the act of 1835, amendatory to the act directing the mode of proceeding in chancery. 33 Ohio L. 13. It enacts "that all assignments of property hereafter 391] made by debtors to trustees in consideration of *insolvency, and with design to secure one class of creditors and defraud others, shall insure to the benefit of all the creditors, in proportion to the amount of their demands."

The plaintiffs, who are among the general creditors of the Jeffreys, demand an equal distribution under this section of the statute, and deny the lawfulness of the preference the Jeffreys sought to give to their creditors. There are certain errors, either of transcription or of the press, which affect the interpretation, and which give the phraseology of this section a very awkward appearance. The phrase, "*contemplation of insolvency*," should probably be substituted for "*consideration of insolvency*;" the word "*insure*" is a substitute for the word "*inure*," and the word "*defraud*" was probably intended to be "*defer*."

The right to prefer one creditor to another, in good faith, has always existed. During the commercial embarrassment, a few years since, debtors, in view of insolvency, adopted the plan of assignments to trustees, either to create inconvenient embarrassment upon the pursuit of debts, or to preserve their property from a compulsory sale, or to impose terms upon creditors, or to secure some other profitable result to themselves. Examples of these

practices may be found in 5 Ohio, 293; 7 Ohio, pt. 2, p. 246–248. Hence the statute of 1834, the terms of which, as they appear, relate to *fraudulent conveyances made to trustees* only. It does not affect conveyances made to a creditor, nor a conveyance made without fraud. The statute of 1838 goes farther, and secures the equal distribution of *all assignments made to trustees in view of insolvency*, whether fraudulent or not. The changes in the law may, therefore, be shortly expressed.

Before 1835, fraudulent assignments being void, any individual creditor might separately pursue his rights. By the statute of 1835, assignments to trustees were made the subject of equal distribution, if fraudulent; but since the statute of 1838, all the assignments to trustees, whether fraudulent or not, if made in view of insolvency, are divided among all creditors. Conveyances, other than those made to trustees, are not affected by either statute.

There is nothing in the evidence, or in the terms of this assignment, which show it to be fraudulent. The rights of the plaintiff, therefore, are postponed to those of the enumerated creditors. With this expression of opinion, the case is remanded to the county for further proceedings, reserving all other questions.

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*Northrup's Lessee v. Brehmer. [392

Two deeds, neither recorded within six months after execution, the second deed, if first recorded, shall prevail in the absence of all notice.

Ejectment from Tuscarawas county.

Both parties claim title from Jacob Leonard, who was the patentee of the land from the government.

On October 13, 1820, Leonard conveyed to Brehmer. On February 13, 1834, he conveyed the same land to Smith, under whom Northrup claims. The defendant was in possession, but had not recorded his deed. His deed was put on record on September 16, 1834, and Northrup's on June 6, 1837. The plaintiff, though the youngest grantee, claims as an innocent *bona fide* purchaser, without notice, more than six months having intervened between the

execution and record of the deed to Brehmer. There was no evidence of notice in fact.

ATHERTON and PECK, for the plaintiff:

Contended that the conveyance to Brehmer was fraudulent and void as to Northrup, because it was not recorded within the six months allowed by law, and before the conveyance to the plaintiff's grantor. They cited 29 Ohio L. 384, and 22 Ohio L. 220.

The delay for more than six months to record the deed under which plaintiff claims, in no way strengthens the defendant's title, or weakens that of the plaintiff.

No argument was submitted for defendant.

Judge WOOD delivered the opinion of the court:

This case involves merely the construction of the statutes for the recording of deeds. The statutes provide that unless an older deed shall be recorded within six months of its execution, it shall be deemed *fraudulent* against a subsequent *bona fide* purchaser without notice. Neither of these deeds were recorded within six months of their execution, but the last was executed before the first was recorded, and as to that, in the absence of all evidence of notice, the first must be held fraudulent. We do not see how the omission to record the last deed affects the question; there is no claim by a later purchaser without notice. The plaintiff will have judgment, but the defendant is entitled to the benefit of the occupying claimant law.

393] *SAMUEL FROST *v.* JOHN JOHNSON.

An accord on mutual promises to perform is not good, if there be no performance before action brought.

ERROR to a judgment of the Supreme Court in Athens county.

The action was debt upon an arbitration bond. The declaration sets out the award by which Frost, the then defendant, was directed to surrender to Johnson a farm belonging to him which was then in Frost's possession, with the grain in the ground, and to pay $173.76 damages, and also nine dollars of the costs of the suit. The breach assigned, is the non-payment of the money.

To this declaration there are three pleas, and the only question is as to the sufficiency of the second plea, to which a demurrer is filed. This plea avers that after the making of the award, in consideration that Frost agreed to deliver Johnson a horse and wagon, and to pay him on or before April 1, 1835, $48.76, with interest on $173.76 from March 29, 1834, and also to cut and shock the grain in the declaration mentioned, and to repair all the fences on the farm, Johnson agreed to receive the horse and wagon, and to permit Frost to cut and shock the grain and to repair the fences, and to deliver him two-thirds of the grain in the shock, and to receive the said horse and wagon and the said agreement, in full satisfaction of the sum of $173.76 and all interest then due, and also of the costs. Frost then avers that he delivered the horse and wagon to Johnson, who received it, and that on the 5th of July thereafter, he was ready and offered to cut and shock the grain and to repair the fences, and that Johnson prevented him from so doing, and that he is still ready to do the same; but it contains no averment that he ever paid the $48.73.

J. WELCH, for plaintiff in error, insisted:

1. That an accord constituting part of an agreement upon other and new subject matter, or an agreement upon a new consideration, containing an accord, is a good plea. 1 Com. Dig. 207; 2 Johns. 158; 2 Lutw. 1538.

2. That an accord with part performance (or tender of performance) attended with expense or loss to the defendant is a good plea. 2 Johns. Ch. 243; 1 Com. Dig. 205; Chit. on Con. 274.

3. That an agreement with part performance is a good plea.

*4. The plea avers a *satisfaction and discharge* by the plaint- [394
iff in receiving the horse and wagon and agreement.

J. T. BRAZEE, for defendant in error, contended that the true doctrine on the subject of accord, etc., is this:

1. Every accord ought to be full, perfect, and complete; for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed. 9 Coke, 79; 2 H. Bl. 317; 2 Term, 24; 5 Term, 143; 9 Johns. 233; 4 Lit. 342.

2. The accord is an agreement by simple contract to discharge a debt and by specialty, and being of less nature can not be a satisfaction.

GRIMKE, J., delivered the opinion of the court:

An accord without satisfaction is no bar. The accord or agreement to accept satisfaction must be actually and fully executed to form a defense. Bac. Ab. Sit. Accord, A; 1 Ld. Raym. 122; 2 New R. 148; 3 East, 252.

This is the general principle, and the case of Watkinson *v.* Higlesby, 5 Johns. 384, does not contradict it. There, A. pleaded that he, together with B., being indebted to C. and several others, agreed to assign all their stock in trade, and outstanding debts to C., and their other creditors, who agreed to accept the same in full satisfaction of their debts, and averred that he and B. did deliver all their stock in trade and assigned all the debts due to them, which were received in full satisfaction by C. and their other creditors, and it was held to be a good satisfaction.

There was not a mere substitution of one right of action in the place of another against the same person. The debt of C. was canceled, although a right of action as against others had sprung up in its place. It was not in the power of C. to execute the agreement for those others, although it might be in his power to execute his own agreement. An accord not executed is no bar to the pre-existing demand, but if executed by delivering a *collateral* thing which is agreed to be accepted as a satisfaction, it is a bar.

The old books sometimes speak of records executory on a future day certain, and accords executory without limitation of time; but in both cases it appears to be admitted that if a full perform-

395] ance *does not precede the bringing of the action it is no defense. An accord, says Comyn (Dig. 135; Lit. B. 4), must be executed before the action commenced. In the late case of Cartwright *v.* Cook, 3 Barn. & Adol. 70, it was held that an accord, *with mutual promises to perform*, is good, though the thing be not performed at the time of action. And in the case of Goodright *v.* Cheesman, 2 Barn. & Adol. 328, it was held that an agreement not performed, although it was not good as an accord and satisfaction, would be a good defense under the general issue. But as Mr. Chitty, in his work on contracts, remarks, this decision is not in conformity with preceding determinations. If there were any real conflict between the English and American authorities, when collected and well considered, I should be disposed to give the preference to the latter. And I observe that in the late case of Russell *v.* Lytle, 6 Wend. 390, it was held that to an action of debt on

bond for the payment of money, a plea averring an agreement to accept a surrender of lands, mortgaged as collateral security, and a tender of performance by the defendant was not a bar. This carries us back to the old doctrine that accord executed is a satisfaction. But that accord executory is only substituting one cause of action in the room of another. In Allen *v.* Harris, 1 Ld. Raym. 122, it was decided that an accord before execution is no bar; and, as remarked in 6 Wend., this has been so often ruled that a decision to the contrary would overthrow all the books.

The doctrine in 3 Barn. & Adol., that an accord with mutual promises to perform is good, though the thing be not performed at the time of action, rests upon the single dictum of Comyn, and is contradicted by the general current of the authorities. I do not see, then, how this plea can be sustained. The determination on the demurrer was right, and the judgment must be affirmed.

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*Thomas Magee *v.* Thomas S. Beatty and James M. Bell, [396
Administrators of Z. A. Beatty.

Since the passage of the act of March 16, 1838, "declaratory of the law on the subject of mortgages," all doubts are removed with respect to their priority, and whether executed before or since the passage of that act, they take effect from the time of their delivery to the recorder.

Reserved in Guernsey county.

This is a case in chancery. The facts, so far as it is necessary to state them, are as follows:

At the March term of the court of common pleas of Guernsey county, 1834, the complainant recovered a judgment at law against Thomas S. Beatty, for one thousand dollars damages, besides costs of suit; upon which judgment execution was issued on the 2d day of April next following, which was levied on lot numbered 18, in the town of Cambridge, in said Guernsey county, as the property of said Thomas S. Beatty.

On February 27, 1834, Thomas S. Beatty mortgaged the lot in controversy to Zaccheus A. Beatty, by deed of mortgage of that date, but which was not acknowledged until the 12th day of March, of the same year. This deed was left for record on the

14th day of March, but not actually recorded in the book of records until the 2d day of April. The term of the court of common pleas commenced on the 24th day of March.

It is alleged in the bill that this deed of mortgage was executed without consideration, and for the purpose of defrauding creditors, especially the complainant. Zaccheus A. Beatty, in his answer, denies the fraud, sets out the consideration for which the deed was given, and avers that the same was good and *bona fide*.

Thomas S. Beatty has not answered.

Since the institution of the proceedings, Zaccheus A. Beatty, who was originally a defendant, has deceased, and James M. Bell, his administrator, has been made a party defendant.

The prayer of the bill is, that the mortgage deed may be declared void, or postponed as a lien to the complainant's judgment; and that the land may be sold to satisfy that judgment.

COWAN and PARRISH, for complainant, and PECK, for defendants, argued the case at length.

Judge HITCHCOCK delivered the opinion of the court:

This case was argued at great length and with much ability, and submitted to the court at the last term. The question of 397] *fraud seemed to have been abandoned, as well it might be, there being no proof to sustain the allegation.

As presented to the court, it was a case of two creditors contending for the priority of lien, and this priority must depend upon the construction of the statutes relative to the subject. The mortgage under which the defendant, Bell, as administrator of Zaccheus A. Beatty, claims, was executed, acknowledged, and left with the recorder of the county, previous to the first day of term of the court at which the complainant recovered his judgment, but was not actually copied into the record book until after the rendition of that judgment. If, then, by a fair construction of the statute, a mortgage takes effect from the time it is left with the recorder, the defendant has the preferable lien, but if, on the other hand, it only takes effect from the time it is copied into the book of record, then the mortgage in this case must be postponed to the complainant's judgment. By section 4 of the act prescribing the duties of county recorders, 29 Ohio L., they are required to record "all deeds, mortgages, and other instruments of writing, required by law to be recorded," in regular succession,

according to the priority of their presentation; "and if a mortgage, the precise time of the day on which the same was presented, shall also be recorded." By section 8, the recorder is subjected to an indictment for certain acts of commission and omission therein specified, one of which is the omission to record, "without good excuse," any deed, or other instrument of writing, within twenty days after the same is received for record. In section 7 of the act to provide for the recording of deeds, etc., 29 Ohio L. 346, it is enacted, "that all mortgages, executed agreeably to the provisions of this act, shall be recorded in the office of the recorder of the county in which such mortgaged premises are situated, and shall take effect from the time when recorded; and if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented shall be first recorded, and the first recorded shall have preference." It will be seen that there is no little obscurity in these several provisions taking them all in connection, At least it so seemed to the court at the last term, and we could not agree as to the proper construction. In consequence of this difference of opinion, the case was continued. The difficulty is, however, now removed. On March 16, 1838, the legislature passed an act upon this subject, in which, after reciting that doubts had *arisen "whether deeds of mortgage take effect [398 from the time the same are delivered to the recorder of the proper county for record, or from the time the same are actually copied into the record book, and that it is proper such doubts should be removed," they declare and enact "that mortgages do, and shall take effect and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered on record." 36 Ohio L. 62. This declaratory law, we suppose, is decisive of the rights of these parties, and the claim of the complainant can not be sustained. The bill might with propriety be dismissed, each party to pay his own cost. But as all the parties in interest are before the court, and as the complainant has a lien upon the land subject to the mortgage, we think it right that the property should be sold, and that from the avails the mortgage debt should be first paid, next the costs of this suit, next the judgment of the complainant, and if there be any surplus, that the same brought into court, and shall decree accordingly.

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GEORGE YAGER *v.* ABRAHAM WILBER.

The remedy of forcible entry and detainer extends to all cases of entry or maintenance of possession by actual force, and is not limited to the cases enumerated in section 19 of the statute regulating proceedings in forcible entry and detainer.

ERROR to the common pleas of Jackson county.

The record shows a writ of *certiorari* from the court of common pleas, by which proceedings, in forcible entry and detainer, before two justices, were brought up and reversed.

The justices' record shows a complaint to them by Yager, that Wilber, with a strong hand, forcibly and unlawfully "entered upon the premises, and with force and strong hand, as aforesaid, doth yet unlawfully hold possession thereof;" that the case came duly to trial, "the proofs and allegations of the parties were fully heard;" their title papers exhibited to the jury; a verdict of guilty, and a judgment of restitution rendered.

The court of common pleas reversed this judgment, because the complaint did not set forth that Wilber was either a tenant holding over his term, or a judgment debtor in possession, or an occupier without color of title. To reverse this judgment of reversal in the common pleas, is the object of the present suit.

399] *J. T. BRAZEE, for the plaintiff in error:

Contended that section 1 of the act regulating proceedings in cases of forcible entry and detainer, being general, covered every case of unlawful and forcible entry and detainer, or of forcible detainer only, and was not controlled by section 19 of the act, and therefore that the justices in this case had jurisdiction of the complaint. The section referred to provides "that two justices of the peace shall have authority to inquire, by jury, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully, and by force, hold the same." 29 Ohio L. 211.

But if the court should think this general clause controlled by section 19 of the act, then he insisted the record did not *affirmatively* show that this case is not embraced in that section.

A. G. THURMAN, contra:

Presented section 19 of the act regulating proceedings in forcible entry and detainer, in these words:

"That proceedings under this act may be had, in all cases, against tenants holding over their term; in sales of real estate on execution, after such sales have been examined by the proper court, and the same by said court adjudged legal; where the judgment debtor was in possession at the time of the rendition of the judgment, by virtue of which sale was had; and where the defendant is a settler or occupier of land, without any color of title, and to which the complainant has the right of possession." 29 Ohio L. 214.

He contended no action could be sustained under the act, but one of the enumerated cases in section 19, the legislative object in passing that section being most palpably only to restrain the action to those cases, as is seen by reading sections 1 and 19 of the act together as a whole. The construction contended for on the other side, would directly conflict with section 109 of the justices' act, which provides that the jurisdiction of justices *shall not* extend to "actions on contracts for real estate; or actions in which the title to lands and tenements *may be drawn in [400 question, except actions for trespass on real estate," provided for in the act. 29 Ohio L. 190.

Judge LANE delivered the opinion of the court:

The question for the decision of the court is, whether section 19 of the "act to regulate the action of forcible entry and detainer," 29 Ohio L. 210, limits the proceeding under the act to the cases enumerated in that section. One of our most valuable elementary publications, Swan's Justice of the Peace, 296, expresses an affirmative opinion upon this question. A contrary practice, however, has long obtained in this state, and our present examination leads us to hold this practice correct

Proceedings in forcible entry and detainer are not a remedy of the common law, but were given by statute. The first we find punishing such is in the 5 C. 2, c. 18; the first which seems to provide for the restitution of the lands to the ejected tenant, 8 Hen. 6, c. 9; but this object is more fully accomplished by later statutes. The object in all these cases is, not to try the right, but to repress force, even where exerted under color of right, and to induce men to apply to the laws for relief, instead of seeking to do

themselves justice, especially by means which the law abhors. The entry or detainer must, therefore, be *by force* and *strong hand, actual violence*, or the remedy is not given by statute. These words are essential, and mean, says Justice Gross, 7 Term, 308, something more than a common trespass.

Such was the state of the English law at the settlement of our state. Our first statute was adopted by the governor and judges from Massachusetts, in 1795. It is directed against those who make *unlawful* and *forcible* entry, and restitution is made, if the jury find the premises are held *unlawfully, with force and a strong hand.* 1 Chase's Ohio Stat. 188. "It is clearly established (says Dane) that in Massachusetts, even a right of entry is to be effected in a peaceable manner." 4 Dane Abr. 732. And the English authorities show that if one having a right to enter, enter *manu forti*, he may be indicted, notwithstanding his right, and possession restored. 3 Salk. 170; 2 Salk. 450, 479. Our subsequent statutes contained the same substantial provisions. Such are the two statutes of 1805 (1 Chase's Stat. 482) and 1819. 2 Chase's Stat. 1082. They are applicable to no other cases than those accompanied with actual force. The amendatory act of 1823 (Chase's
401] Stat. 1248) first extended the remedy to the new *class of cases of tenants holding over, judgment debtors, and settlers without color of title. This *amendatory* act leaves unimpaired the operation of the original statute, upon entries made by actual violence, and enlarges the remedy, by bringing within its scope, a new class of cases, which are not necessarily attended with force. In the revision of 1824, the statute assumed, substantially, its present form. Its ancient office, to restrain entries or detainers by actual force, was conferred by the first, and its enlarged operation over the three additional cases was continued by section 14 of the revised act. Chase's Stat. 1359.

We find nothing, then, in the history of these changes which countenances the opinion that section 19 of the present statute was intended to restrain the powers conferred in the first. On the contrary, the omission to provide some *festinum remedium* to entries upon land accompanied with force, and necessarily leading to a breach of the peace, would leave a chasm in our legislation.

The complaint under examination shows an entry *by force.* The common pleas erred in reversing the proceedings, and their judgment is reversed.

JOHN G. WORTHINGTON v. PHILIP YOUNG.

A stipulation in a lease that the tenant may remove any improvements he may make on the rented premises, does not entitle such tenant to set off the value of such improvements, where they have been recovered, in ejectments, against an action for mesne profits.

TRESPASS for mesne profits, from Hamilton.

This suit is brought to recover the mesne profits of a lot in Cincinnati, the plaintiff having obtained judgment in ejectment. 6 Ohio, 335. Upon trial to a jury, a verdict was obtained by the plaintiff for $1,030. The defendant's counsel moved for a new trial, and the motion was reserved for this court. The motion is, "and the defendant moved the court to set aside the verdict and grant a new trial in this cause, because the court erred in rejecting evidence offered by the defendant." The defendant had held possession of the lot under a lease made to him by Hargraves and wife, made in April, 1816. The fee in the lot was in the wife. Hargrave died in February, 1833. This lease was not executed as a deed, and this court has heretofore decided that the term expired with the life of Hargrave. 6 Ohio, 313.

There was a clause in the lease providing that the tenant *"should be at liberty to remove at pleasure all new build- [402
ings put by him on the premises." The building on the lot was burned partly down, pending the ejectment, and repaired by the defendant. After verdict in ejectment, application was made to have the improvements valued under the occupying claimant law, and overruled by the court.

FOX, in support of the motion for a new trial, insisted:

That the defendant offered to prove to the jury, "that the improvements made by him and left on the premises were worth as much, or nearly so, as the rent of the premises," and that the court erred in rejecting this evidence. He contended that the action for mesne profits was an equitable one, admitting every kind of equitable defense in which expenditures, made in valuable and lasting improvements, may be offset against rents. The damage to the owner, by being kept out of possession, is the rent he would have received, less the amount of the valuable improvements, although the allowance for improvements can not go be-

yond the rents claimed. He cited 2 Johns. Ch. 441, 442; 4 Cow. 168; Ad. 215; 8 Wheat. 81, 82; 2 Wash. C. C. 165.

H. Stow, for plaintiff:

Contended that the proof was abundant on the trial, that the improvements made by the defendant were inappropriate to the situation of the lot, of no intrinsic value, and were removed as worthless. They were made in his own wrong, and his only remedy under the lease was to remove them, which he refused to exercise. The case in 4 Cow. 166, decides that even a *bona fide* purchaser of the fee, on being ejected, could only claim allowance out of the rents for "permanent, useful, and beneficial improvements."

Wright and Walker, on the same side, insisted:

1. That since the passage of the occupying claimant law, no tenant has a right to set off to the suit for mesne profits, after eviction, his expenditures for improvements, though made in good faith.

2. That law provides a way by which all such claims could 403] *be directly asserted and adjudicated. And certainly no tenant is permitted to apply for relief under that law, and failing, then, to set off his claim against the rents, as in this case. They reviewed the evidence, and contended that the jury did allow the value of the materials, and so reduced their verdict to the sum found, and therefore the verdict should not be disturbed. The evidence was received, *pro forma*, and ruled out as inadmissible under the lease. It appeared that the building was burned down twice while defendant occupied, the last time pending the ejectment, and its repair then was in his own wrong; and that he refused to remove the materials under the clause in his lease.

Judge Wood delivered the opinion of the court:

The motion for a new trial is extremely vague and indefinite; and it may be difficult, after the lapse of so much time, to recall the precise state of facts, as they occurred at the trial. The counsel do not agree, and we repeat there is no statement with the files to remove the difficulty, as the judges who sat at the trial have not their minutes present, and must depend on recollections alone. In the ejectment, the lease from Hargrave and wife, defective in its execution, was held not to pass the legal possession of the wife, who owned the fee, for any period beyond the life of her husband.

The plaintiff recovered under a subsequent conveyance of the fee by Hargrave and wife. This lease contained a stipulation that the defendant should be permitted to remove, at the expiration of the lease, *any improvement he should erect on the premises.* Evidence, *on the trial for mesne profits*, was introduced to show that he was notified to do so, but neglected.

The counsel for defendant claim to have offered in evidence on the trial to show, that while the defendant, he made valuable and permanent improvements on the premises, in order to have the amount set off against the rents and profits. The plaintiff's counsel think the proof offered only tended to show that the defendant had incurred expense in making the improvements, that it was admitted, and was abundant to show, that the improvements made added nothing to the intrinsic value of the lot, were neither beneficial nor permanent, nor suited to the location. If I do not greatly err, the evidence offered was objected to, and admitted, reserving the question, and afterward ruled out. The defendant's counsel suppose it was refused, because it did not recognize the principle that improvements might be set off against the rents *and profits, and that in this respect the court erred. The [404 court did not intend to express any doubt that such set-off might be made in a proper case, and we think we did not. Such is the law in New York. 2 Johns Ch. 441; 4 Cowen, 168. In Pennsylvania. Addis. 218. And it has been so decided in the Supreme Court of the United States, in a Kentucky case. 8 Wheat. 81. The authorities concur in the position that the improvements to be allowed must be "beneficial, useful, and permanent." The evidence offered to the jury did not, in our view, show such improvements as could be legally set off against the plaintiff's demand; and this has led the plaintiff's counsel also into error, as to the reasons for taking this proof from the jury. Upon the last hypothesis, the decision could not be sustained, because the character, as well as the value of the improvements, were questions of fact for the jury, and upon slight evidence would have been left to their judgment. Our impression is—and in the decision of the question before us, that must be our main guide—that the evidence was rejected, because it was inconsistent with the clause in the lease, which has been referred to. The defendant, by this contract with Hargrave and wife, was at liberty to remove all *new buildings*, which he should put upon the premises, at pleasure. In this he

was not prevented, but desired and notified so to do. By this stipulation, we then thought he had contracted as to the mode of compensation for any improvements he should make, in the privilege of removing them at pleasure. It was, therefore, doubtless the understanding of the parties—and such we held the covenant implied in the case—that no other erection could be placed upon the premises but such as were removable, and that the lessor in no other mode should be held to make compensation. The court adheres to that opinion, and holds that the evidence was properly rejected, or taken from the jury. Motion overruled, and judgment on the verdict.

405] *CALVIN G. SUTLIFF, RUEL MILLER, HENRY W. SMITH, CHAUNCY H. WILCOX, AND LEVI SUTLIFF *v.* DANIEL GILBERT.

It is no cause for setting aside the verdict of a jury that, when agreed upon, it is written and sealed, and the jury separate, if afterward they come into court and report the sealed verdict.

It is not misbehavior in a jury, in a civil case, to make up and seal a verdict, and then separate; nor is it error in the court to reassemble the jury and send them out to correct such verdict.

In an action of trespass, a general verdict for the plaintiff is equivalent to finding all the defendants guilty.

Plaintiff can not use the allegations in a defendant's notice as admissions of facts to affect him before the jury.

THIS case was removed from the Supreme Court of the county of Trumbull to this court by writ of error.

The original case was an action of trespass *de bonis aspertatis* commenced by Gilbert, the defendant in error, against the plaintiffs.

To the declaration the defendants pleaded the general issue, and, at the same time, gave notice in substance that on the trial of the case they would insist, by way of defense, that the goods in controversy were the goods of one Garry Lewis; that several judgments had been recovered in favor of divers persons in the court of common pleas and Supreme Court of Trumbull county against said Lewis, on which executions had been issued and delivered to the defendant, Smith, as sheriff of said Trumbull county;

that the said Smith, by virtue of said executions, levied upon said goods as the property of said Lewis; that the other defendants acted as the servants and assistants of said Smith in making said levy, and by his direction; that the said Smith having so levied upon said goods on February 2, 1836, caused public notice to be given according to law that he should sell the same at public auction, as the law directs, on the 15th day of said February. And that afterward, in accordance with said notice, "the said Smith proceeded to sell the said goods and chattels at public vendue on the said 15th day of February, and did sell all of said goods and chattels agreeably to said notice, at said public vendue, for a large amount of money, to wit, the sum of $2,500, and applied the full amount," etc.

At the last term of the Supreme Court of Trumbull county, the cause was submitted to a jury, and a verdict returned in favor of the plaintiff for $2,882.04 damages.

The defendants then moved for a new trial for various reasons, but the motion was overruled, and judgment rendered on the verdict.

Subsequently the defendants, by their counsel, tendered a bill of exceptions, which was sealed by the judges holding the court.

This bill of exceptions discloses the following fact: The jury, after hearing the testimony, argument of counsel, and charge of the court, retired to consider of their verdict, and agreed upon, *wrote, signed, and put under seal a verdict in the words [406 and figures following, to wit:

"Daniel Gilbert *v.* H. W. Smith. It is the opinion of the jury that the plaintiff shall recover the amount that was made out of the goods at sheriff's sale, with interest from the date of the levy; the jury are unable to find any document among the papers delivered to them by the court or the parties whereby they can ascertain the exact sum, therefore they are compelled to give their verdict in this indifferent manner." Signed by all the jurors.

The jury having agreed upon this verdict, without the order or leave of the court or of the parties, left their room and dispersed for a number of hours, and the next morning upon the coming in of the court, the above-mentioned verdict was delivered by the jury to the court. "Whereupon the court instructed the jurors again to retire to their rooms and determine upon the amount of damages from any materials in their possession, and advised them

that, in the absence of other testimony, they might adopt the sum alleged in the defendants' notice to have been made out of the goods as evidence of such amount." The counsel for the defendants excepted to the sending out of the jury after they had dispersed as aforesaid; also to their finding any amount when it could not be ascertained from any evidence previously submitted to them, and also to the instruction of the court as to the evidence to be derived from the notice. The jury again retired, and subsequently returned a verdict, as before stated, upon which judgment was rendered.

To reverse this judgment this writ of error is brought.

The errors assigned are:

1. "The court instructed the jury to retire again to their room for the purpose of finding again in said cause, after they had delivered their said finding in court, and had been a long time dispersed."

2. "The court instructed the jury to retire and find some amount of damages against the defendants, when, by the said written verdict, said jurors had not found said defendants guilty, and had expressly found that said plaintiff had not proved himself to be entitled to any damages in said cause.

3. "The court instructed said jury that for the purpose of enabling them to find some amount of damage against said defendants, they might regard the notice filed by the defendants' 407] *counsel, under the plea of the general issue, as evidence against said defendants."

M. SUTLIFF, for plaintiffs in error:

Insisted that the jury having agreed upon a verdict, although the same was informal, and having then separated for hours, could not, with propriety, again be permitted to retire and consult upon the case. And, further, that the jury having fully examined the evidence submitted to them, and having returned into court and stated that there was nothing in that evidence which would enable them to assess damages for the plaintiff, in accordance with the rule by them fixed for the assessment of such damages, could not, consistently with the principles of law, be again returned to their room for further consultation.

As to the third error assigned, he insisted that the court were clearly wrong in permitting the jury to receive as evidence against the then defendants an allegation contained in the notice

attached to the plea of the general issue. Even where there are, under the statute, several pleas, and issues joined upon all, the facts admitted by the defendant in one plea can not be evidence in favor of the plaintiff to sustain the issue upon another, and this, notwithstanding the rule that facts admitted by the pleading need not be proved by the parties. A notice attached to a plea of the general issue is no part of the record in a case; it is intended merely to give a plaintiff notice of the defense relied upon, and in no case can it be made use of as evidence against the party filing it. Upon this point in the case he cited 2 Saund. Pl. & Ev. 724; Weller, 380; 1 Chit. Pl. 480; 2 N. Hamp. 89; 8 Johns. 109; 13 Ib. 229, 475; 10 Ib. 142; 14 Ib. 89; 20 Ib. 749; 2 Tyler, 74.

Wm. L. Knight, for defendant in error:

Argued that inasmuch as the jury had settled the rights of the parties so far as the issue was concerned, and nothing remained for them to do but to compute the damages upon the principles settled, it was proper for them again to retire to make their computation. And, further, that the sum stated by the defendants in their notice as being that for which the goods were sold by the sheriff, might with propriety be by the jury taken into consideration in making the computation.

*Judge Hitchcock delivered the opinion of the court: [408

Two questions seem to be necessarily involved in the examination of the first error assigned in this case. The first is, whether after a jury have retired to consider of their verdict, and shall have separated before returning their verdict to the court, they can afterward be permitted to retire to their room and further deliberate upon the case submitted to them; and, second, whether it is in the power of the court, after a jury shall have agreed upon their verdict, and delivered the same in court, to send them out again for further deliberation.

As a general rule, a jury shall not be permitted to separate, after retiring from the bar of the court, until they have agreed upon their verdict. Still, there may be peculiar circumstances which would, to some extent, justify a separation. But in no case would it be proper for individual jurors to mingle with others than their fellows until a verdict is found. And should a jury, of their own pleasure, having been put in charge of a case, leave

their room and mingle with the people of the town or vicinity, and afterward return to their room and agree upon a verdict, it would be good ground for a motion to set aside the verdict, and for a new trial.

Formerly, jurors were not permitted to separate until their verdict was returned into court; and in order to compel them to agree, they were deprived of the necessaries of life for the time being. But these rigid rules have been much relaxed in the practice of this state. We do not, it is true, permit jurors to separate until a verdict is found, but we allow them all necessary refreshment, and when they have agreed upon a verdict, if the court is not in session they are permitted to put it under seal, and then separate. This verdict they return when the court again convenes. The verdict thus returned has the same effect, and must be treated in the same manner, as if returned in open court, before any separation of the jury had taken place. But if, after having once agreed, and put their verdict under seal, a jury shall separate, and subsequently meet in their room and change this sealed verdict, such altered verdict could not, with propriety, lay the foundation of a judgment. Such conduct in a jury would constitute that degree of misbehavior for which a verdict ought to be set aside. The most common practice of this court is to direct the jury that if the court shall not be in session when they shall have agreed, to return their verdict to the clerk; and if he can not be found, to put it under seal, and bring it in at the open-
409] ing *of the court In thus far relaxing ancient rules, we have experienced no inconvenience, and I have no doubt we might go further without any danger; for I believe the more confidence is placed in jurors, the more they are treated like reasonable men, the more will right and justice, through their instrumentality, be done

In the case under consideration, the jurors did not misbehave. They did not separate until a verdict was found and placed under seal. This same verdict was, at the opening of the court on the next morning, delivered to the court. As before remarked, it must be treated and considered the same as if returned before there had been any separation of the jury. The question then arises, whether the court, after a jury have once returned a verdict, have the power to remand them to their room for further consultation. When the jury return a general verdict settling the

rights of the parties, and upon which a judgment can be entered, or where they return a special verdict, finding the facts of a case and leaving the questions of law arising upon those facts to the court, it would be improper for the court to send them out again for further consideration. If such verdict was against law or evidence, the only relief against its effects would be on a motion for a new trial. But where the jury have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, in an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not specified in dollars and cents that amount, they may, with propriety, be returned to their room to make the computation of interest.

The case under consideration is somewhat analogous. The jury found in favor of the plaintiff; they fixed upon the rule of damages, and that rule was, the amount for which the property in litigation sold, together with the interest from a specified time. Nothing remained but to compute this interest, and for this purpose the jury might well be sent out. It was not with a view to make any change in the verdict, or to settle any new principle, but to carry out the original finding. And if there was any evidence before the jury showing the amount for which the property had been sold, and which had by them been overlooked, it was proper for the court to refer them to it. There was, then, no error in this case, in sending out the jury a second time.

The second error assigned is intimately connected with the *first, and only differs from it essentially in this, that by it [410 it seems to be supposed that the jury did not respond to the issue between the parties, inasmuch as they did not explicitly say that the defendants were guilty of the trespass. It is rarely the case in our practice, that the jury return a formal and technical verdict. They usually find in general terms for the plaintiff or defendant, and the clerk, in recording the verdict, applies this finding to the issues made up by the pleadings. In this case the jury found for the plaintiff, which was equivalent to finding the several defendants guilty; and the clerk very properly so recorded their verdict.

The third error assigned, raises the question whether a plaintiff can make use of a notice attached to the defendants' plea of the general issue as evidence against the defendant. This is

believed to be a new question, so far as the practice of the courts of this state are concerned. By our practice act, a defendant may, by leave of the court, plead several pleas to the same action. He may plead the general issue, and one or more special pleas in bar. Now the principle is well settled, that what is admitted in pleading need not be proven. And a party will be stopped from proving anything inconsistent with, or against his plea. I apprehend, however, that this principle applies only to the admissions of the particular plea upon which the issue on trial is joined. A defendant pleads the general issue and a special plea in bar. In this special plea he admits, to a certain extent, the allegations of the declaration. Notwithstanding these admissions, upon the trial of the issues, the plaintiff must prove his case as set forth in the declaration, otherwise he will fail under the plea of the general issue. And in making this proof, he can not use the admissions in the special plea as evidence against the defendant. If this could be done, a great part of the advantage intended to be secured by the statute in allowing double pleading, would be lost. To take a familiar instance: in an action of slander, a defendant pleads the general issue, and a special plea of justification. An admission of the speaking of the words in this special plea does not exonerate the plaintiff from proving such speaking. I am aware that it was once otherwise decided in Massachusetts; but this decision is believed to be contrary to the decisions of the courts in England and in the other states of this Union. It is certainly contrary to the uniform practice of the courts in this state. If such be the rules and principles with respect to 411] *pleas, how is it with respect to a notice? Each plea must in itself contain a defense to the action. If the facts therein alleged are true, the plaintiff may demur to it, and thereby raise the question whether those facts constitute a defense. But it is not so with a notice. It can not be demurred to. So far it is not a part of the record. It does not constitute the defense in the case. That defense consists in the denial of the whole cause of action by the plea of the general issue. If the notice, then, can be used as evidence by the plaintiff, it must be on the ground that it is an admission or confession by a defendant of the facts therein stated. But this is not the character or intention of a notice. It is intended merely to apprise the opposite party of the matters and things to be relied upon in defense, in the event that the

plaintiff shall sustain his case by proof. Such being its character and intent, it would be improper to permit a plaintiff to use it as evidence to make out his case. But even could it be used in evidence as a confession or admission, like every other confession, it must be taken all together. It would not be allowed to take a part and reject a part, but the whole must go together. And if, taking the whole together, there is sufficient to exonerate the defendant from the action of the plaintiff, it must so operate. Otherwise a defendant would be placed in a worse situation by giving notice, than by embodying the facts contained in his notice in a special plea. Because, if embraced in a special plea, and a plaintiff would admit any of them as evidence, he must admit the whole, as he does in effect, by a general demurrer. On the whole, we entertain the opinion that a plaintiff can not use the whole or any part of a notice, attached to a defendant's plea, as evidence against a defendant, and this opinion is fully sustained by the authorities cited by defendants' counsel.

In the case under consideration, the court directed the jury that, in the absence of other proof, they might take as evidence against the defendants, an allegation in the notice as to the amount for which the property in litigation was sold at sheriff's sale. In this there was error, and for this error the judgment must be reversed, with costs.

The case will be again set down for trial, and remanded to Trumbull county.

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*JOHN DERUSH AND SARAH HIS WIFE, LATE SARAH STEARNS, [412
v. A. C. BROWN, THE HEIRS OF JENKS BROWN, MARY BELVILLE, AND MICHAEL CASSILLY.

Declarations of the husband, seized of land in fee, can not be given in evidence to affect his widow's claim for dower.

A widow can not have dower in lands of which her husband held the legal title in trust for others, with no beneficiary interest in himself.

PETITION for dower, reserved in the county of Montgomery.

The complainants state in their petition, that the said Sarah Derush, late Sarah Stearns, intermarried with one Orris Stearns;

that during coverture the said Orris was seized in fee of certian town lots in the town of Miamisburg, county of Montgomery, and of other tracts or parcels of land in said county, as specified in said petition; that the said Orris in his lifetime conveyed the said lands to the said Jenks Brown and A. C. Brown; that the said Orris in his lifetime and during coverture had an equitable interest in certain other lands in said county of Montgomery, which he also disposed of to the said Jenks and A. C. Brown without the consent of the said Sarah; that the said Orris died in 1831, leaving the said Sarah his widow and relict; and that the defendants have the next estate of inheritance in the land in the petition described. The complainants pray that the said Sarah may be endowed of the premises, both legal and equitable.

To this petition, A. C. Brown, Mary Belville, and the heirs of Jenks Brown, by their guardian *ad litem*, have answered. Michael Cassilly is in default.

The defense set up in the answer is, that Stearns purchased these lands as the agent, and with the property and money of the said Jenks and A. C. Brown, and took a conveyance of them in his own name as their trustee, and that in the settlement of their concerns, he released to them any and all claim in the land.

The case was argued at length by LOWE, for the complainants, and ODLIN, for the defendants. But as these arguments were principally upon the facts, it is unnecessary and would be difficult to abstract them.

On the part of the complainants, the following authorities were cited: 7 Johns. Ch. 243; 2 Vern. 436; 5 Johns. 412; 1 Ohio, 535; 7 Ves. 454, 425; 9 Ves. 500: 1 Ves. jr. 431; 5 Ves. jr. 189; 4 Johns. Ch. 604, 605, 482; 6 Johns. 290.

On the part of the defendants, the following: 1 Johns. Ch. 582; 2 Johns. Ch. 405, 409; 3 Johns. 216; 2 Sugden, 152; Gow on Part. 255; 5 Ves. 189; 17 Ves. 298; 1 Ohio, 542; 4 Kent's Com. 50; 3 Blackf. 7; 1 Taunt. 141; 1 Cr. Dig. 154; Bac. Ab. 380.

413] *HITCHCOCK, J., delivered the opinion of the court:

So far as respects the claim of the complainant, Sarah, to be endowed of the equitable interest of her late husband in the lands specified in the petition, it is easily disposed of. Section 1 of the act of January 28, 1823, relating to dower, provides that a widow shall be endowed of one-third part of all the lands of which her

husband was seized as an estate of inheritance at any time during the coverture; and one-third part of all the equitable interest in lands of which the husband was possessed at the time of his death. There is no pretense but that the equitable interests in the case under consideration were disposed of by the husband in his life-time; of course, to these the widow can have no claim. If there had been fraud in the sale of these equities, if the object had been to deprive the wife of her claim to dower, the case might have been different. But there is no proof of any fraud or of any such object or intention.

There is a great mass of testimony in the case, which it would be an arduous as well as useless task to recapitulate. It will be only necessary to state the facts as deduced from that testimony. But before doing this, it is proper to state that a part of the evidence introduced by the defendants consists of testimony to prove the declarations of Stearns, made after he had acquired title to the lands in which dower is claimed. A deed of release from Stearns to the Browns, in which he admits that he purchased the lands in trust for the Browns, with their property, and as their agent, has also been introduced. To the competency of this testimony the counsel for complainant objects, and insists that such admissions, made either by parol or by deed, can not operate to defeat a widow of dower, and of this opinion are the court. It is true that the right of the widow to dower is derived from the husband, and in a certain sense she may be said to claim under him. But in some respects her interest is adverse to his. By the marriage and seizin of the husband she acquires an interest in the land, of which he can not divest her. He can not do it by deed of conveyance, and it would be strange if he could by parol declaration. Declarations made by the husband, while contracting for the land, or at the time of purchase, may with propriety be proven; but declarations made subsequently must be excluded. In considering this case, therefore, we have rejected the admission in the deed of release above referred to, as well as all the other declarations of Stearns made after he became seized of the land.

*There is also another portion of the testimony which we [414 have felt ourselves compelled to reject, consisting of the statements of Stearns relative to his connection with the Browns, and of the circumstances under which he was transacting business for them. Most of the testimony introduced by the complainants

consists of proofs of such statements; and, surely, if the right of the widow of Stearns can not be defeated by his statements, it can not be sustained by them.

Laying aside the testimony above referred to, and considering that part only which is competent, the following state of facts is proven:

Previous to the year 1824, Orris Stearns had been engaged in the clothing and cloth-dressing business, in Kentucky, and had failed. In that year, Jenks and A. C. Brown established a store in Miamisburg, and employed Stearns as their agent or clerk, to take care of the same. He continued in their employ for a number of years, and was thus engaged when the lands in controversy were purchased. With the avails of the store the lands were in part paid for, and in part paid for by the Browns themselves. Sterns also caused improvements to be made on some of the lots, and these improvements were paid for in the same manner as the lands.

An effort has been made by the complainants to establish the fact that there was a partnership existing between the Browns and Stearns, and there is testimony looking to that point. It consists, however, of loose declarations made by Jenks Brown, who is proved to have been a very intemperate man, and made, too, generally, if not uniformly, when he was intoxicated. There was a time, it is true, when there was an agreement in existence that Stearns should have the merchandise and all the other property if he would secure to the Browns its value; and during the existence of this agreement he carried on the store in his own name. This was after the purchase of the lands, and continued but for a short period, as Stearns failed in making the security. The weight of evidence is decisive that there was not, at any time, any partnership; and it is equally decisive that the land was paid for with the property of the Browns. Afterward, upon settlement, the deed of release was executed.

Here, then, is a case where an individual, intrusted with the property of another, disposed of the same and vested the avails in real estate in his own name; and his widow now claims dower in that real estate. It seems to the court to be a clear case of
415] *resulting trust, and that Stearns must be considered as holding the land in the character of a naked trustee. In such case is a widow entitled to dower? Chancellor Kent says, "as a general

principle, it may be observed, that the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seizin." 4 Kent's Com., 2 ed. 50. In equity, at the inception of the title, this property was in the Browns, and a court of equity would have decreed to them a conveyance; and in executing the release, Stearns done no more than a court of equity would have compelled him to do. At no time had he any beneficial interest in this property. He had merely a technical legal seizin. In the case of Green *v.* Green, this court say, in speaking of the widow's interest in the estate of her husband, "Her estate is but a part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband. The husband can by no act of his destroy or affect her right of dower where it has once attached, *but it only attaches where he has a real beneficial interest in the lands, of which dower is claimed.* Upon this principle it has been held, that the wife of *a mere trustee* was not entitled to dower in the trust estate, although the husband was at law seized of an estate of inheritance. A mere technical seizin of the husband, without any beneficial interest in the estate, will not entitle the wife to dower." 1 Ohio, 535. If such are the principles of law, and that they are we have no doubt, then, in the case under consideration, the widow of Stearns is not entitled to dower, and the complainant's bill must be dismissed.

GOUDY'S LESSEE *v.* S. SHANK.

A guardian for minors, when all claim in one right, may institute proceedings for partition without process.

The title of the purchaser in a sale, on proceedings for partition, is not affected by a failure to make returns of the purchase money, or obligations, into court.

A deed upon partition is good, if acknowledged in open court, of which fact the clerk may make an official certificate, though there be no general entry on the minutes.

EJECTMENT from Greene.

The facts in this case are agreed, and show that the plaintiff makes title under the heirs of Andrew Goudy. The title of the defendants depend upon the validity of certain proceedings in the court of common pleas of Greene county, at the instance of the 416] *guardian of those heirs. These proceedings are sufficiently shown in the opinion of the cours.

A. HARLAN, for plaintiff, insisted:

1. That the proceedings in the court of common pleas were extrajudicial and void.

2. That no deed was properly executed by the sheriff under the proceedings.

ODLIN and SCHENCK, contra, contended:

1. That these proceedings were not adversary, but summary, under the statute for petition amongst heirs. The petition is by the guardian of *all* the heirs of Goudy.

2. That the acknowledgment of the deed by the sheriff, is certified by the clerk as done in court, and need not be evidenced by journal entry. 1 Ohio, 315, 316; Wright, 95. It is a mere ministerial act. The bringing the money into court, and the securities for their approval, is but directory to the officer, and the omission will not affect the title of a third person purchaser. If the proceedings at the sale were regular, that is sufficient for the title of the purchaser. Wright's S. C. 529, 459; 4 Wheat. 503; 3 Ohio, 191; 1 M. & S. 425; 5 Barn. & Ald: 746; 13 Johns. 97; 1 Gal. 419; 3 Ohio, 561.

Judge LANE delivered the opinion of the court:

In November, 1824, Robert Scott, guardian of all the minor children of Andrew Goudy, filed his petition, stating that the southeast quarter section of land, No. 10, in township 6, range 6, descended to them, in which Mary Goudy, the widow, had right of dower. That expenses had been incurred in the support of the several children, to pay which it was necessary to sell this land, and praying the court to order the dower to be set off, to cause partition amongst the heirs, and for the sale of the shares of the heirs to pay the expenses of their subsistence. Sections 2 and 9 of the statute of 1820 (2 Chase's Stat. 1162) authorizes guardians of minors to bring petition and do any act necessary to make partition of the lands of their wards. A Scott was guardian of all inter-

ested in this land, having the right both to institute and defend, or consent to proceedings. No process of an adversary character was necessary to confer jurisdiction upon the court.

*At the November term, 1824, the court finding the ten- 417
dancy, order partition, and appointed commissioners to set off dower, and make partition. At the next term, the report of the commissioners is returned by the sheriff, showing dower, set-off, and appraisal of the land, because it could not be divided without prejudice. The report is confirmed by the court, and sale of the land is ordered to be made by the sheriff, under the usual formalities, one-third of the purchase money to be brought into court, one-third to be secured by note or bond, payable in one year, and the remainder to be secured in the same manner, payable in two years, with interest. The case was duly continued until August, 1826, when the sheriff returned a sale to Robert Dunlap, in conformity with the law; that one-third of the money had been paid, or will be paid in hand, and the residue will be secured. Here the record ends; but a deed from the sheriff is produced, bearing date May 9, 1827, reciting the order, the sale to Dunlap for the consideration of $676, one-third of which is paid, and the remainder secured by notes, approved by the court, in two annual payments, etc., conveys the land to Dunlap. A certificate of the clerk, and the seal of the court, is appended, showing the acknowledgment of this deed in open court. There is no entry of such acknowledgment in the journal, nor of any act of the court approving the sale or security, or ordering distribution of the money, but the sheriff will prove, if permitted, the acknowledgment of the deed in open court.

The plaintiff's counsel assume that this sale is not to take effect, or the deed to be given, until after the money or securities are brought into court and distributed. The acts of courts in proceedings of this kind, being analogous to proceedings *in rem*, will always receive a favorable construction. 6 Ohio, 255. It will be observed that the statute requires no confirmation of the sale. Where the sheriff possessed authority to sell, his sale to a purchaser, in good faith, is effective. His other duties, prescribed by statute, are directory upon him. If he fail to bring the fruits of the sale into court, he becomes responsible to those entitled to them.

It is said, that an entry on the journal of the court, is the only

valid evidence of the acknowledgment of the deed in open court. It is believed that the clerk, in this case, has conformed to the common practice, in giving an official certificate of this sort, on the deed. And we think this practice may be justified; acts of the court, to be valid, must be entered on the journal; but acts of 418] *the sheriff in court, calling for no judicial action, are sufficiently authenticated by the certificate of the clerk under the seal of the court.

We find no defects in these proceedings sufficient to render the sale void, and therefore the title of the heirs has passed. The widow is not a party before us; how far her rights were affected by these proceedings is not adjudicated in this case.

Judgment for the defendant.

Mary C. Allen v. Robert W. McCoy.

Where a husband, during coverture, was seized of several tracts of land, which, after his death, came into various hands, a petition for dower is properly preferred against every separate holder.

Wild, uncultivated lands are, and always have been, subject to dower in Ohio.

In making assignment of dower, the rule of value is to be taken at the time of assignment; but all increased value from actual improvements on the ground is to be excluded.

This was a petition in chancery for dower, which was heard upon the following state of facts:

In the year 1803, the defendant intermarried with Geo. W. Allen, who was then seized in fee of seven half sections of land, each containing 320 acres, all situate in the refugee military lands, and lying in the counties of Franklin, Fairfield, and Licking, in the State of Ohio, as those counties were bounded when the petition was filed. In the year 1805, Geo. W. Allen mortgaged these lands, but his wife did not join in the mortgage. Allen died in 1806. In the year 1809, the lands were sold by the sheriff under judicial proceedings on the mortgage, and purchased by different persons. Lyne Starling purchased half section 29. The city of Columbus was laid out upon part of this ground, and the petition prayed for dower in only a single town lot, No. 264, owned by the

defendant, and highly improved. All the half sections were wild, uncleared lands, at the death of Geo. W. Allen, and remained so, to the sale under the mortgage.

The case was heard first by the court in bank, at the December term, 1836, upon a very full argument, and a decision pronounced in favor of the petitioner, to endow her of one-third of the then value of the particular lot of land, exclusive of the improvements erected upon it. A petition was immediately presented for a bill of review, which was allowed. This bill of review was held under consideration until December, 1838, without any change being effected in the opinions of the judges, when it was dismissed. The case was made most intelligible by first inserting the argument against the petition.

*WILCOX, for the defendant. [419

Most of our ideas, in regard to dower, are derived from the law of England. It is proposed, therefore, with the indulgence of the court, to consider that law, at *three* periods:

1. In Glanville's time—Hen. II, A. D. 1184.
2. In Littleton's time—Ed. IV, A. D. 1481.
3. At the present time.

The law of England, in relation to dower, was first reduced into a system by Glanville. He is the earliest writer who undertook to lay down the law in detail. His treatise formed the foundation on which the superstructure of subsequent times has been reared. He is therefore selected as a starting point. If we can but acquire accurate notions of what the law was in his time, we shall be the better able to understand the law as it has been modified by acts of parliament and the decisions of courts of justice, at different periods, down to the present day.

What, then, was DOWER, in the time of Glanville?

It was that property which a freeman gave to his wife, *ad ostium ecclesiæ*, at the time of the espousals. The husband either named the dower specially, or he did not. If he did not name it specially, the dower was understood, by law, to be the third part of the husband's *liberum tenementum*, for the rule was that a reasonable dower of a woman should be a third part of her husband's freehold, which he had *at the time of the espousals*, and was seized of in *demesne*. If he named the dower especially, and it amounted to more than a third, such special dower was not to be allowed, but it was to be admeasured to a fair third; for though the law

permitted a man to give less than a third in dower, it would not suffer him to give more. If a man had but a small freehold at the time of the espousals when he endowed his wife, he might afterward augment it to a third part, out of purchases he had made since; but if there had been no provisional mention of new purchases at the time of such assignment of dower, although the husband had then but a small portion of freehold, and had made great acquisitions since, the widow could not claim more than the third part of the land he had at the time of the espousals. In like manner, if a man had no land, and endowed his wife with chattels, 420] money, or other things, and afterward *made great acquisitions in land, she could not claim any dower in such acquisitions; for it was a general rule, that, where dower was specially assigned to a woman *ad ostium ecclesiæ*, she could not demand more than what was then and there assigned. 1 Reeves' Com. Law, 100, 101.

The woman could make no disposal of her dower during the lifetime of her husband. But every married man, in his lifetime, might give or sell, or alien in any way whatsoever, his wife's dower. The wife, however, if she did not consent to the sale, might claim her dower, after the husband's death, *against the purchaser*. Besides, in such a case, the heir was bound to deliver to the widow the specified dower assigned, if he could; and if he could not procure the identical land, he was to give a reasonable *excambium*, or recompense in value; and if he delivered her the land that was sold, he was in like manner bound to give an *excambium*, or recompense, to the alienee of the husband. This *excambium* was other lands of the value at the time of the warranty made, that is, *at the time of the alienation*. 1 Reeves' Com. Law 101, 102; 1 Caine, 111.

Such was the widow's *right* of dower.

Next as to the *remedy*.

On the death of the husband, the dower, if it was a parcel of land named and specified, was either vacant or not. If it was vacant, the widow, with the assent of the heir, might take possession thereof, and hold herself in seizin. If part only was vacant, she might take possession of that, and for the remainder, she might have her writ of right directed to her warrantor; that is, the heir of the husband. The writ was as follows.

"*Rex M. Salutem, Præcipio tibi quod sine dilatione plenum rectum*

teneas A. quæ fuit uxor E. de una hida terræ in villa, etc., *quam clamat pertinere ad rationabilem dotem suam, quam tenet de te in eadem villa per liberum servitium decem solidorum per annum pro omni servitio, quam N. ei deforceat, et nisi feceris, vice come faciat, ne oporteat eam amplius inde conqueri pro defectu recti*," etc.

The plea being removed into the county, or king's court, and the parties appearing, the widow set forth her claim in these words:

"I demand that land, as appertaining to such land which was named for me in dower; of which my husband endowed me *ad *ostium ecclesiæ*, on the day he espoused me, as that of which [421 he was invested and seized at the time he endowed me."

To this claim the adverse party might make various answers; he might admit or deny that she was endowed of the land, but whatever was the answer given, the suit ought not to proceed without the widow's warrantor, that is, the heir of the husband; he was, therefore, summoned by writ to appear. If the heir, when he appeared, admitted what the widow alleged, he was bound to recover the land against the tenant in possession, and deliver it to the widow. If he declined prosecuting the suit, he was bound to give her an equivalent in recompense, for in all events the widow was to be no loser. If he denied what was alleged by the widow, the suit was continued between him and her; and if she prevailed, he must deliver to her the land in question or a sufficient equivalent.

This was the course for a widow to take when she was obliged to sue for a *part* of her dower; but when she could get possession of no part of it, and was put to sue for the whole, her suit was commenced originally in the *curia regis*, and the person who withheld her dowry was summoned by a writ called a writ of dower *unde nihil habet;* whoever was in possession of the land, whether the heir, or any other person, the presence of the heir was always necessary. If a stranger was in the possession, the heir was summoned by a writ of summons *ad warrantizandum*. The suit between the heir and the widow might be varied as the heir pleased. He might set up by way of defense that no assignment was made, or deny that to be the land assigned, etc. If she prevailed, he was bound to deliver her the land or an equivalent; and if he delivered her the land that was sold, he was bound in like manner to give a recompense to the purchaser.

Thus stood the law of dower in the time of Glanville.

SECOND PERIOD.—Littleton's time—Ed. IV., A. D. 1481.

During the 300 years next succeeding the time of Glanville, several alterations had been made in the law of dower; Littleton enumerates five kinds:

1. Dower by the common law.
2. Dower by the custom.
3. Dower *ad ostium ecclesiæ.*
4. Dower *ex assensu patris.*
5. Dower *de la pluis beale.*

422] *The first alteration was made by *magna charta*, c. 7 Henry III, A. D. 1225. It is in these words:

"And for her dower shall be assigned unto the widow the third part of all the lands of her husband which were his *in his lifetime*, except she were endowed of lessee at the church door."

This is what Littleton calls "dower by the common law." It seems to have been the intention of this provision in the charter to enlarge the widow's dower, for it has already been seen that in the time of Glanville, it was to be a third of such lands only as the husband had *at the time of the espousals.* This intention, however, seems not to have been carried into effect for nearly 200 years. According to Bracton, in 1256, the claim of dower was still limited to the freehold of which the husband was seized *at the time of the espousals;* and it seems that it was not till the times of Henry VI and Edward IV, that the law became thoroughly settled, giving to the widow a third part of such lands as were her husband's *at any time during the coverture.* Brac. 92; 1 Reeves' Com. L. 312; 3 Ib. 332; Lit., sec. 36. The reason may appear from the fact that from the signing of *magna charta* in 1225, to the time of Henry V, 1417, the previsions of that instrument were so evaded by the crown, that it was necessary to confirm and re-enact it by no less than *thirty-two* acts of parliament—on an average, once in six years. 2 Co. Inst., tit. Mag. Char.

Another alteration was made by the statute Merton, A. D. 1235. It is in these words:

CAP. I. "First of widowes, which after the death of their husbands, are deforced of their dowers or quarantine of the lands whereof their husbands died seized, and that the same widowes after shall recover by plea; they that be convict of such wrongful deforcement shall yield damages to the same widowes, that is to say, the value of the whole dower to them belonging from the

time of the death of their husbands unto the day that the said widowes by judgment of our court have recovered seizen of their dower, and the deforcers nevertheless shall be amerced at the king's pleasure."

This seems to be the first legal provision in England giving damages to the widow; and is limited to those cases where the husband *died seized.*

During this period several cases of dower are found reported *in the *year books;* the substance of which seem to be em- [423 bodied in Harg. n. 8, 31, a. 193; 1 Thos. Coke, 455. If the feoffee improves by buildings, yet dower shall be as it was in the seizin of the husband. For the heir is not bound to warranty, except according to the value as it was *at the time of the alienation*, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable. Hale's Mss. This seems to be simply a recognition of what the law was in Glanville's time.

The legal *remedies* in behalf of the widow continued the same; a writ of right of dower, when she claimed a *part*, and a writ of dower *unde nihil habet*, when she was put to sue for *all* her dowery.

Dower in England—*at the present time.*

The law, as administered by courts of justice at the present day (except as to the *new* remedy in chancery), seems to be much the same as in the time of Littleton; but quite a change has taken place in regard to the estate itself, as a legal provision for the widow. A late writer says:

"In modern times many causes have tended to diminish the popularity of this legal provision. The existence of dower is rarely adverted to, even by professional men, in any other light than as an incumbrance upon a title; and an instance very rarely, indeed, occurs in which property becomes liable to dower in the hands of a purchaser. Universal consent seems now to have designated the provision made by the law with so much care, as an incumbrance, the anticipation of which is, in every case, to be desired. Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty and the domestic affections afford a surer pledge among the virtuous than positive institutions." Park. 2, 3.

Besides, the *reason* of the law has ceased to exist. The law originally created this provision for the widow, because without it she could not have had a support. In those early times, the personal estate, even of the richest, was very inconsiderable. The husband, during his life, could make no provision for his wife. Trusts had not been invented. Lands could not be devised until the time of Henry VIII. The *villains* were attached to, and formed a part of the soil. On the death of the husband the use of one-third of the land, with one-third of the *villains* to culti-
424] vate *it, was the only means of supplying the widow and children with bread. Hence, DOWER, even to a maxim, became one of the favorites of the law. But the *villains* have been set at liberty. Wealth and refinement, and correct moral feelings, have introduced other and better modes of providing for families. That estate which *we* call DOWER never had an existence among the refined nations of antiquity. Necessity gave it birth among the northern nations of Europe; and experience has shown that it is not very congenial to a state of cultivation and refinement. Harg., note 8, 30 B; 1 Thos. Coke, 442; 2 Fitz. N. B. 148.

Hence, the few modern cases of dower in England. Nothing can more clearly illustrate the change which has taken place in England, than the late statute of 3 and 4 Will. 4, section 4, by which it is enacted:

"That no widow shall be entitled to dower of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will." Har. Index, 1225.

The rule in force in the time of Glanville and Littleton, seems still to be recognized as the law of the land; that as against a purchaser, the value of the widow's dower is to be estimated as at the time of the alienation. Harg., note 8; 1 Thos. Coke, 455.

We now come to the United States.

MASSACHUSETTS.—The provision of *magna charta* was re-enacted in this state, giving to the widow one-third of all the lands owned by the husband at any time during the coverture.

The common law rule is also adhered to, that as against the purchaser, the widow's dower is to be estimated, as at the time of the alienation. 9 Mass. 8, 221.

The law is settled in this state, "that a widow is not entitled to dower in land which was wild when alienated by the husband, but has been brought into a state of cultivation by the husband's

grantee, at the time dower was demanded. 15 Mass. 164; 1 Pick. 21; 7 Pick. 143.

MAINE.—In this state the law seems to be the same as in the State of Massachusetts. 4 Kent's Com. 41.

NEW HAMPSHIRE.—The provision of *magna charta* was adopted in this state, but has been subsequently so modified by statute and rules of court, that "the widow is not entitled *to dower in [425 any lands whereof her husband was seized during the marriage, unless such lands were in a state of cultivation during such seizin, or were used and kept as a wood or timber lot as appurtenant to some farm or tenement; and in case of alienation by the husband, she shall be endowed of one third part in value, according to the value thereof, at the time such husband so lost or parted with his title thereto." 2 N. H. 56, Law Reg.

NEW JERSEY.—The provision of *magna charta* was also adopted in this state. The question as to the assessment of the value against a purchaser who had made improvements, came up for decision in 1810, and the court held that "the widow could recover no more than the value of the third part of the land at the time of the alienation." Penn. 513.

SOUTH CAROLINA.—The statute in this state is peculiar. The common law rule is observed in the assessment of the value as against a purchaser. In 2 Mills, 256, it is said by the court, "The reasonableness and correctness of the rule, that dower shall be assigned acording to the value at the time of the alienation, is so clearly established by principle and authority, as to supersede all reasoning upon it." 1 Baily, 281.

INDIANA.—In this state the provision of *magna charta* has been adopted; and, as against the purchaser, the value of the widow's dower is estimated as at the time of the alienation. 2 Blackf. 223.

VIRGINIA.—The provision of *magna charta* has been adopted in this state; and, as against the purchaser, the value of the widow's dower is estimated as at the time of the alienation. 4 Leigh, 498.

NEW YORK.—In this state the provision of *magna charta* has been adopted; and, as against the purchaser, the value of the widow's dower is estimated as at the time of the alienation. 2 Johns. 484; 11 Johns. 510; 13 Johns. 179; 10 Wend. 480.

VERMONT, CONNECTICUT, NORTH CAROLINA, AND TENNESSEE.—In these states, alienation by the husband alone, bears dower. The

426] wife is entitled to dower only when the husband dies *seized. 2 Vt. 329; 5 Conn. 462; Law Reg. 214, 757.

LOUISIANA.—Dower is unknown to the civil law

MARYLAND, ILLINOIS, MISSISSIPPI, AND DELAWARE.—The provision of *magna charta* in these states seems to have been adopted; but no judicial decisions have been found as to the rule for estimating the value of the widow's dower. See Law Reg.

ALABAMA AND MISSOURI.—These states have peculiar statutory provisions. No rule has been found regulating the value of the widow's dower.

KENTUCKY.—In this state the provision of *magna charta* has been adopted.

In 1831, the question came up as to the mode of estimating the value of the widow's dower, and it was held "That if the husband had alienated the land in his lifetime, seizin should be given to the wife of a third in value, according to the condition of the land at the date of the alienation." 6 J. J. Marsh. 591.

Afterward, in 1833, and apparently without reference to the case just cited, it is said, "If the applicant be a *bona fide* alienee, and had, since his purchase, made improvements which enhance the value of the lots, the appellee would be entitled to dower in only so much of the lots, unimproved, as would be equivalent to one-third of the value, at the time of the alotment, had there been no melioration. Such seems to be the settled American doctrine." See 4 Kent's Com. 67, 68; 3 Dana, 348.

PENNSYLVANIA.—The provision of *magna charta* has been adopted in this state; and the rule is settled that the widow's dower is to be estimated at the time of the assignment, excluding improvements made by the purchaser. 5 Serg. & Rawle, 289.

OHIO.—By the statute law, if not by the ordinance, the provision 427] of *magna charta* is, and always has been, in force in the *State of Ohio. There remains no written evidence to show what construction was put upon our early statutes.

In the first settlement of Cincinnati, a low piece of ground on the outskirts of the city, then of little value, became subject to dower. From improvements made by the purchasers, and from the general improvements of the city and country, the lots became valuable, and the right of dower was asserted. Several cases were brought before the Supreme Court between the years 1822 and 1829, and were heard and decided as follows:

Ewing *v.* Keys, Same *v.* Stansbery, Same *v.* St. Clair, Same *v.* Enness. These were writs of dower, before Judges Burnet and McLean, in which judgments were rendered in 1822, adopting the common law rule, directing the value of the dower to be estimated as at the time of the alienation. The records of two of these cases are presented to the court.

Dickey *v.* The City of Cincinnati. This was a writ of dower. Verdict in 1823, before Judges Burnet and Hitchcock, finding specially the value at the time of the alienation. New trial granted. Discontinued in 1824. It is understood the new trial was granted on other grounds than the rule laid down for estimating the value. The record of this case is with the papers.

McCullough *v.* Wallace, Same *v.* Ferris, and Same *v.* Hathaway. Writs of dower, before Judges Burnet, Hitchcock, and Sherman, in 1824. Verdict finding that the husband died seized, and fixing the value at the time of his death, and judgment for that value. The record of one of these cases is before the court.

Barr *v.* Brown. This was a bill in chancery. In 1828, an interlocutory decree before Judges Burnet, Hitchcock and Sherman, finding the value at the time of the alienation, and directing assignment. Final decree in 1829, by Judges Pease and Sherman.

After such a series of decisions, extending through a period of seven years, it can hardly excite surprise that the law of dower was considered as settled by the profession, in the southern and central parts of the state.

It is now proposed, with the permission of the court, to consider the origin and soundness of the rule estimating the value of dower at the time of the assignment.

A lot in Pittsburg, which it seems had been alienated by the husband at an early day, became subject to dower. Its *value [428 by the erection of buildings on the lot itself, and by the general growth of the city, had become much enhanced. The court of common pleas adhered to the common law rule, and directed the value of the dower to be estimated as at the time of the alienation. Error was taken, and the Supreme Court reversed the judgment of the court below, and directed the value to be estimated as at the time of the assignment, excluding improvements made by the alienee. 5 Serg. & Rawle, 289.

The judge, who delivered the opinion of the court, went at some length into the year books, and from some of his remarks it would

seem that he felt disposed to deny that the common law rule confined the widow to the time of the alienation. This, however, seems to be a conceded point. The language in which the rule is laid down in the English cases, *ex vi termini*, excludes all other modes of assessing the value. The late cases in New York and Virginia, in citing the case from Pennsylvania, look upon it as an innovation of the common law; and the court in South Carolina say, "that its correctness is so clearly established by principle and authority as to supersede all reasoning upon it." 1 Bailey, 281. The judge, too, at length seems to admit the rule. The conclusion he comes to upon this part of the case seems to be this: That he has found no express authority in the English books either for or against allowing the widow the benefit of general improvements, and therefore he feels himself at liberty to adopt a new rule, consistent with his views of right and justice. See the last two sentences in the opinion of the court.

The main ground, however, upon which the court seem to rest their opinion, is the case of Gore *v.* Brasier, 3 Mass. 544.

Now, it is not often that Chief Justice Parsons and the common law are found in opposition to each other, more especially in regard to any of these old principles, which, for so many ages, have regulated the enjoyment of real estate. Not thirty days before, in Wilder *v.* Bailey, 3 Mass. 298, he had said "that the common law is always a safe guide;" and in the present instance, it is believed that his opinion, when rightly understood, will be found to establish a position diametrically opposite to the one supposed.

The subject before him was a rule for estimating damages on the covenant of warranty.

His language is this:

"By the ancient common law, the remedy on a warranty was 429] *by voucher or *warrantia chartæ*, and the recompense recovered in those suits was other lands to the value at the time the warranty was made. This was the general rule; but when the warrantor, on being vouched, entered into the warranty generally, he was bound to enter other lands to the value of the lands lost at the time he entered into the warranty. In valuing the land lost, when the vouchee entered into the warranty specially, no regard was had to any improvements made by the tenant, as by erecting edifices, or turning pasture into arable land; nor was the discovery of a mine in the land lost, after the warranty was made,

but then not known, considered in ascertaining the value of the land to be recovered in recompense.

"An effect originating in this feudal principle may be discovered in this state in the assignment of dower against a purchaser. When the husband aliens with warranty during the coverture, and afterward dies, his widow shall not be entitled to the benefits of the improvements made by the purchaser, because he could not recover their value in other lands against the heir on the warranty of the husband. This rule is now supported in this state on principles of public policy, that purchasers may not be discouraged from improving their lands."

Now it is to be observed that the remarks of Chief Justice Parsons, thus far, are limited to that class of cases where the alienee of the husband actually makes improvements on the land purchased. In such a case, he says, that from principles of public policy, the rule of the common law has been adopted in Massachusetts, estimating the value of the widow's dower as at the time of the alienation.

He then proceeds:

"If the lands have greatly risen in value, not from any improvements made upon them, nor from the discovery of any new sources of profit, but from extrinsic causes, as the increase of commerce and population, it may be a question, whether on the *extendi ad valentiam*, the lands to be recovered in recompense would be valued at the increased price, so that the quantity might be proportionably reduced. This is here a question of mere curiosity, unless it should be considered as relating to the lands to be assigned to the widow for her dower. If the husband during the coverture had aliened a real estate in a commercial town, and at his death the rents had trebled from various causes, unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it *would be difficult for the purchaser to maintain [430 that one ninth-part only, and not one third-part, should be assigned to her."

Now, this is the class of cases here referred to, where the alienee of the husband enters, but makes no additional improvements on the land.

The case he supposes is this:

A lot of land in a commercial city is alienated by the husband. The purchaser enters, but makes no improvements whatever upon

the premises. He permits them to remain in the same condition as when they went out of the family, and ceased to be benefited either by the joint or several labor of the husband and wife. The husband dies, and the widow seeks her dower.

Now the suggestion is, that the case being freed from embarrassment by reason of improvements made by the purchaser, the court may assign to the widow by metes and bounds, one entire third part of the land; or, she may receive one entire third of the annual rents as they accrue; and thus, as the use of one-third of the land becomes more or less valuable; or, as the annual rents rise or fall, from the operation of general causes, the widow gains or loses accordingly.

But where the purchaser has made improvements, it is a conceded point that there can be no assignment by metes and bounds, and that the widow can not receive one-third of the annual rents as they accrue. Some gross, specific sum of money must be fixed upon, to be paid annually to the widow during her life. In order to fix this amount, some plain, practical standard is necessary; and what that standard shall be, is the question.

It is to be observed, too, that in the case supposed by him where the purchaser makes no improvements, Chief Justice Parsons himself speaks with hesitation, "and where that man doubted, who will dare to be positive?" Yet admitting the opinion to be entirely correct, it had nothing to do with the case before the court in Pennsylvania. In that case the purchaser had made improvements, *bona fide*, on the lands purchased; and the question is, what shall be the rule, in such a case, for estimating the value of the widow's dower? Shall it be the common law, or shall it be something else? We claim the authority of Chief Justice Parsons, in favor of the common law.

Aside from authority, there seem to be but two reasons named by the Supreme Court of Pennsylvania.

431] *"That dower is a claim founded on law, and favored by courts both of law and equity.

"That it would be hard, indeed, upon the widow, if she were precluded from taking her share in the increasing prosperity of the country."

That in former days the claim of dower was highly favored, is beyond dispute. The maxim which connects it with "life" and "liberty," runs through all our elementary books. The reasons,

as well as the cause for its decline and fall, have already been shown. The maxim may still be current, but it has lost one-third of its meaning.

But what seems to be a conclusive argument on the point is this: The very law, which made the widow's dower its favorite, withheld from her that advantage which she is now seeking. It was the common law that gave her its especial protection. It was the common law that confined her dower to the value at the time of the alienation.

As to the right of the widow to the benefit of general improvements, it would seem that no two minds could differ.

If such general improvements have been promoted by the expenditure of the time and money and labor of the widow, she, and not the purchaser, ought to enjoy the benefit.

If the general improvements have been promoted by the expenditure of the time and money and labor of the purchaser, he, and not the widow, ought to enjoy the benefit.

If neither the widow nor the purchaser have contributed their aid toward such improvements, then neither can complain if the benefit be withheld.

If it be necessary to adopt some general rule, what then are the dictates of public policy? What is the experience of other countries? What principle has governed England through a period of seven hundred years, from a state of indigence to its present independence? What principle prevails in almost every state of the Union?

The language of the Supreme Court of New York is appropriate. 10 Wend. 486.

"It is certainly reasonable that the enhanced value should inure to the benefit of those, through whose labor, and sufferings, and expenditures, the appreciation has been made. If the property has been rendered more valuable by the general improvements of the country, the defendant, and not the plaintiff, has contributed to that general improvement."

*Such, then, are the *reasons* and the *authority*, which are [432 supposed to sustain the case in Pennsylvania.

But this is not all. Since the decision of the case in Pennsylvania, in 1819, the identical principle has been reviewed by the Supreme Courts of New York and Virginia, in 1833, and by the Supreme Court of Indiana, in 1829, and the doctrine pronounced

unsound. 10 Wend. 480; 4 Leigh, 498; 2 Black. 223. And to these authorities the attention of the court is respectively invited.

It is said that the Pennsylvania rule is sustained by the opinions of Chancellor Kent and Mr. Justice Story. The latter seems to have adopted the case from Pennsylvania with but little consideration, and in opposition to the law of his own state. On its face it bore marks of learning and research. The principle was novel. The Supreme Court of Pennsylvania sustain a high reputation, and it seemed safe to adopt their opinion. Chancellor Kent does not profess to have examined the question. And it is a remarkable fact that in Massachusetts and New York, the states in which they respectively reside, the settled rule of law is in direct opposition to the opinions of both Chancellor Kent and Mr. Justice Story. Their opinions were reviewed and pronounced unsound by the Supreme Courts of New York and Virginia, in the cases above cited. 10 Wend. 480; 4 Leigh, 498.

One of the evils supposed to be incident to the Pennsylvania rule is the difficulty of its application. It is seldom proper to rely upon a single instance in the adoption or rejection of any rule; but it is to be remembered that the proposal is to introduce a new rule; and that the case now before the court is merely an entering wedge. Several hundred other lots in Columbus, nearly all the town of Dayton, besides immense quantities of land, are to be brought directly under the operation of the rule, as soon as it shall be once established in favor of this complainant. This case, therefore, in its general features, may be regarded as a fair instance to test the principle.

A simple reference to the evidence and master's report might be sufficient; but as the subject is a novel one, the court will bear with a few words by way of exposition.

320 acres of wild land were aliened by the husband of the complainant, in 1805. In 1806, the husband died, and the right of dower became perfect. The annual rent of the entire tract was
433] then worth nothing. The purchaser, *in conjunction with the owners of adjacent lands, located a town upon the premises and disposed of the lots with warranty. The defendant, among others, is a purchaser. The annual rent of the lot now in controversy (62½ by 187½ feet) is worth about $1,000, including the improvements made by the purchaser. A multitude of causes have been in operation to produce this result. The defendant has con-

tributed largely toward the erection of the state house, the court-house, the several churches, the market-house, the bridge, the wharf, the removal of the seat of justice from Franklin, and perhaps other public improvements. He has also paid the annual taxes for grading and paving the sidewalks and otherwise improving the public streets. The sum total of these expenditures, exclusive of time and labor, is shown to be several thousand dollars.

Now, it is obvious that every dollar of money thus expended by this defendant has gone directly to make up the present annual value of this lot; and it really does seem to be a waste of time and strength, to frame an argument to convince an intelligent court that the defendant, and not the complainant, is justly and honestly entitled to the benefit of these expenditures, and that they must be taken into the account.

But we do not stop here. The evidence shows that this defendant is the owner of three lots, parcels of the same 320 acres aliened by the husband; that he has made large improvements upon all the lots; and that the improvements made upon one essentially increase the value of the others. Now, what is the result of the principle contended for?

This bill is filed against lot No. 1. The improvements made on the lot itself are excluded; but the complainant actually obtains the benefit of the improvements on lots 2 and 3.

This secured, a second bill is filed against the *same* defendant for lot No. 2. She now reaps the benefit of the improvements on lots 1 and 3.

This secured, a third bill is filed against the *same* defendant for lot No. 3. She now reaps the value of the improvements on lots 1 and 2; and thus she actually obtains the benefit of the improvements made upon all the lots.

Such is the identical case before the court. Can it be insisted that this is the law of the State of Ohio, or ought to be?

But this is not all.

At the common law, when the wife prosecuted her writ of *dower against the alienee of the husband, the warrantor [434 was vouched to warranty. When he appeared and entered into the warranty, he took upon himself the entire defense of the cause; and the controversy was then carried on between the claimant and the warrantor, and the tenant "might stay at home." As

against the claimant, the warrantor was regarded as the owner of the land, because he was bound by his warranty to defend it. He therefore could plead that the widow was not endowed—*ne unque accouples*—or any other available matter. 1 Reeves' Com. Law, 380. Hence the modern rule that a grantor, with warranty, may file a bill *quia timet*, in order to protect himself against his warranty. 1 Johns. Ch. 344. If the claimant eventually succeeded, the court rendered a double judgment: one in favor of the claimant against the tenant, and another in favor of the tenant against the warrantor, for lands of equal value. Cro. Jac. 688.

Now, it seems not to be pretended that the *rights* of the parties are in any way affected by the *remedy* which courts of chancery have, in modern times, afforded the widow.

Suppose, then, that the complainant in this case had prosecuted her writ of dower. The defendant might call upon Starling, his warrantor, to defend the suit in his stead. The suit would then be carried on between the complainant and Starling. As against the complainant, Starling would stand as if he never had alienated any part of the lands purchased from the husband. He might make any defense in his power; and upon the very principle laid down in Pennsylvania he might show, that upon the 320 acres of land purchased by him from the husband, he and those under him had laid out a town and made the improvements which give to the lot in controversy its present value. Being bound to protect all those claiming under him, he might make the same defense as if he were now the owner of the entire 320 acres and had made all the improvements with his own hand.

Let it be supposed that Starling had sold no part of the 320 acres, but had himself erected all the buildings and made all the other improvements. Now, if the complainant had filed her bill against him, claiming dower in a lot 100 feet square, parcel of the 320 acres, it can not be seriously contended but that Starling might show that the improvements made on the *residue* of the 320 acres were the very cause which gave its present value to the 100 feet square. On any other principle, if a farm become
435] *subject to dower, the widow may file her bill against any *one lot*, and the owner shall not be permitted to show that the value of that lot has been enhanced by improvements on other parts of the same farm—and so one bill after another may be filed, each against a *single lot*, till the widow obtains the benefits of all

the improvements on the whole farm. The principle is the same in this case. Being bound to warranty against all claims whatsoever, the purchaser from the husband as against all such claims, must be looked upon at law and in equity as the owner of the entire 320 acres, and as such, entitled to defend it, either in the entirety or in parts. That he is not a party to this bill is not our fault. That the complainant has resorted to a court of chancery for a remedy, can not affect the rights of the other parties. That voucher upon warranty having fallen into disuse, does not touch the argument. All the obligation of a warranty rests upon the parties in the shape of a personal action for damages. 3 Mass. 523. Such also seemed to be the views of the complainant when she first asserted her claim to these same premises in the county o Licking, the record of which is presented to the court, as an illustration of this point of the argument for the defendant.

For these reasons it seems clear that all the improvements on the 320 acres are to be excluded from the estimate.

There is yet another consideration.

It is the law, that in case of eviction, by paramount title, the grantee on the covenant of warranty can recover nothing for his improvements, nor for the enhanced value of the land from the operation of general causes. He is confined to the value at the time of the warranty made. Now if the enhanced value be given to the widow, can the defendant, on his covenant of warranty, recover for that value? If not, must he sustain the loss?

Is it right to give the widow so much latitude in the selection of her own *time* for the assignment of dower? If the country be in a state of depression, she may wait better times, till the value of real estate is at its maximum. If she then strikes for her dower, no subsequent reverses can affect her. She must be paid annually the gross sum assigned her, even if the entire estate fall short of that amount.

If the common law rule must be overturned, a better substitute would seem to be the value, *at the death of the husband.* Her right then becomes perfect, and if she stands by, and sees improvements making, and delays her application, it *ought [436 to be at her own risk. In the present instance what vast advantage is given to a widow, in a range of thirty years, to select her time for the assignment of her dower. What would have been the

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value of her dower under the law, as it stood before the case of Dunseth *v.* Bank of United States, in 1836?

In regard to the difficulty in applying the rule under considera. tion, the attention of the court is invited to the opinion of the Supreme Court of the State of New York, in 10 Wend. 486:

"I may however remark, that any other rule than that adopted by this court would be difficult of application. In this very case, some of the witnesses state that the whole improved value arises from the improvements made upon the land in question and the other lands in the same portion of country, all of which were of little value when this lot was sold by the husband of the plaintiff; and they say that as this lot is enhanced in value by improvements on adjoining lots and those in the vicinity, so those lots have been enhanced in value by the improvements on this; and thus, each lot may be said to be enhanced in value by the labor and money expended upon it by its owner. This is certainly true to a great extent, if not to the full extent of the enhanced value. Can any one say what would have been the present value of the lot in question, if the whole western part of the state had remained as it was in 1792; and what would the plaintiff's dower be worth if the whole country was a wilderness? It must be mere conjecture. It is certainly reasonable that the enhanced value should inure to the benefit of those through whose labor and sufferings and expenditures the appreciation has been procured. If the property has been rendered more valuable by the general improvement of the country, the defendant, and not the complainant, has contributed to that general improvement."

The evidence in the case shows, that the use of the lot in question for *one year* is of no value. To be worth anything, it must be rented on a lease for at least five years. Now, if the widow be of such an age as she can not be supposed to live five years, her dower is worth nothing, and nothing can be assigned to her. On the other hand, if she can be supposed to live five years, and the sum to be paid her annually be fixed on this supposition, and she lives only two, three, or four years, she will have received an average value for five years, when in truth
437] *she ought to have received nothing. How shall this be interpreted?

Upon the whole, therefore, it is insisted, that upon reason and authority, the only safe and practical rule is that of the common

law—to estimate the value of the widow's dower as at the time of the alienation; and it is confidently hoped, that upon a considerate review of the whole ground, this court will feel disposed to restore to us the law as it stood prior to 1836.

Stare decisis is always a strong argument. We beg leave to answer it by a simple reference to the language of Chancellor Kent, when the same argument was pressed upon him in the case of Cunningham *v.* Morrel, 10 Johns. 203, 212, 215.

The attention of the court is now requested to another ground of defense.

An early statute of Massachusetts contained this provision:

"And no woman that shall be endowed of any lands, tenements or hereditaments, as aforesaid, shall wantonly or designedly commit or suffer any waste thereon, on penalty of forfeiting that part of the estate whereon such waste shall be made, to him or them that have the immediate estate of freehold or inheritance in remainder or reversion."

A like provision was inserted in the statutes of Maine and New Hampshire.

In each of these three states there seems to have been large bodies of uncultivated lands, neither occupied with, nor appurtenant to, any farm or other tenement, but reserved for the future benefit of the family, or held in market as a species of merchandise, to be converted into cash for the present use of the family.

At length the question came up as to the widow's right of dower in such lands. The common law was silent. It never came in contact with that species of property. It was a matter of much consideration, and came before the Supreme Court of Massachusetts, at three different periods—in 1818, 1822, and 1828. 15 Mass. 164; 1 Pick. 21; 7 Pick. 143.

The construction put upon the statute was this:

"That a widow is not entitled to dower in lands which were wild when alienated by the husband, but had been brought into a state of cultivation by the husband's grantee, at the time dower was demanded."

*The same rule seems to have been adopted also in Maine [438 and New Hampshire. 4 Kent, 41.

Now this identical statute of Massachusetts was adopted into the State of Ohio, and took effect on October 1, 1795; and was the identical statute in force at the time the right of the com-

plainant, in this case, attached to the lands in controversy. It was thus, at the same time, the law of her domicile, and *lex rei sitæ;* and now the question is, why shall not the same statute receive the same construction in Ohio as it has received in the state where it originated, and in the two other states which adopted it?

It is said, to clear wild lands in Ohio is not waste.

A man owns 300 acres of woodland in Ross county, and dies. May the widow, or her husband, on a precarious life estate, sell off the timber and firewood on 100 acres, and then exhaust the soil by crops, thus ruining the inheritance before it reaches the heir, or may she not? This is the question. For who does not see causes in operation which will soon make make woodlands as valuable in every part of the state, as they now are in the county of Ross? The rule can not be restricted in its operation to new counties. It must embrace all or none. Nor can it be limited in duration to the period while the new country is settling. It is to operate through all coming time.

A man in Putnam county has a quarter section of land, with a cabin, and ten acres under fence. He dies, and fifteen acres of woodland next to the clearing is set off to the widow. Now, it is said to be absurd and ridiculous, to say that this woman may not take the boys and add five or ten acres more to the clearing, and thus raise their own bread.

A man in Huron county has 150 acres of land in a good state of cultivation, and with just the right proportion of woodland to sustain the farm. He dies. Twenty-five acres of woodland is assigned to the widow, just sufficient for repairs and fire-wood. Now, it is equally absurd and ridiculous to say, that this woman, as soon as her husband is dead, may employ workmen and strip this twenty-five acres of its timber, and thus ruin the entire farm.

These two instances, now representing two large classes of tenements in the State of Ohio—the former rapidly diminishing, and the latter increasing in the same ratio—show, that in settling the important principle involved in this cause, something
439] *else is to be looked at beyond what may appear to be absurd and ridiculous.

It may be observed that in the class of cases first supposed, the interest of the heir and the interest of the widow both unite in requiring more lands to be cleared; and therefore, in most cases, it

will be done without difficulty. But in the latter class, what is the widow's profit is the heir's ruin.

There is another question which seems to demand some consideration.

The lands alienated by the husband consisted of seven half-sections in the refugee tract, of 320 acres each, located in various parts of the district, and in different counties.

Section 9 of the act relating to dower provides, "That the widow applying for dower in the lands of her deceased husband, may file her petition in chancery against the heir or other person having the next immediate estate of inheritance, setting forth her right thereto, and describing the tracts of land of which she claims to be endowed; and the court, on the hearing of such cause, shall render such decree in the premises as to them shall appear just and consistent with the rights of all the parties interested therein."

Section 11 also provides that the court may order the whole dower to be assigned in any one or more counties, and out of any one or more tracts of land, if the same can be done without prejudice to the rights of any person claiming title to or holding a lien on such lands. 29 Ohio Stat. 251.

Now, it is submitted to the court whether all the persons interested in these lands ought not to be made parties to this bill, or cause shown for the omission.

The statute seems to contemplate that the dower may be located on one of several tracts, and that the owners of the other tracts shall make contribution. All the owners must, then, be made parties.

Where the husband aliens land, and dies seized of other lands, the court would doubtless order dower for the whole to be assigned upon the lands in the hands of the heirs, because those lands would be liable on the warranty of the husband.

In the present case, if all the seven sections, as originally alienated by the husband, were before the court, dower might be assigned on one, and the others decreed to contribute; or if the husband died seized of other lands, these seven sections might *be entirely liberated from dower; and for aught that ap- [440 pears, the husband did so die seized.

It does appear, in this case, that the defendant is the owner of three separate and distinct parcels of one of these half-sections,

and it certainly can not be claimed that three separate and distinct bills can be filed against him.

If the defendants be too numerous to be embraced in one bill, that is not the case made before the court.

Perhaps a discretion may be vested in the court. In the exercise of that discretion, it would seem that all persons materially interested should be made parties. In the present case, the alienee of the husband who has sold with warranty, it is insisted, upon every principle, ought to have been made a party; and it is to be observed that he was made a party in the original suit in the county of Licking, where a considerable portion of the lands lie.

If the alienee of the husband, on one section of 320 acres, lays out a farm consisting of many separate lots, it seems clear that the widow can not file her bill for dower against each of those single lots. And if the same alienee, on another section of 320 acres, lays out a town, with several lots, why shall not the same rule apply?

An attempt has already been made to show that, upon general principle, Starling, the alienee of the husband, is to be regarded, in equity, as well as at law, the present owner of the 320 acres, on which the town of Columbus stands, and therefore he ought to be made a party to these proceedings. The last clause of section 9 of the statute seems to suppose that the final decree will adjust the rights of all the parties interested in the lands. The same section provides that the bill may be filed against the heir, "or other person having the next immediate estate of inheritance." This language may certainly embrace the alienee of the husband, who is bound by his warranty to protect the tenant against all adverse claims, either in the shape of dower or otherwise.

The law is thus laid down by Fitzherbert, 148, note *a*: "A. brings dower against B., *de libero tenemento*, in C.; and afterward, before plaint made, brings another writ in the same bill against the same tenant; this writ shall abate, although that no plaint was made before; for by Shard, one shall not have two writs of dower, *unde nihil habet*, at the same time, in the same bill, except it be on some special matter, as if the tenant purchase other tenements after the former writ."

441] *If such were the rule in actions at law, it can hardly be

expected that a less liberal construction will be put upon our statute by a court of chancery.

Upon the whole case, therefore, it is claimed on the part of the defendant:

1. That the lands being wild, at the time of the alienation, the widow can claim no assignment of dower in the premises.

2. That if she be entitled to an assignment of dower, the value is to be estimated as at the time of the alienation in 1805.

3. That the bill ought to embrace other lands; and that the proper parties are not before the court.

N. WRIGHT submitted an argument on the same side.

H. STANBERY, for petitioner.

The following points are made by the defendant:

That the demandant is not entitled to dower in lot No. 264, or in either of the seven half sections, because they were wild and uncultivated at the time of the alienation by the husband.

That if she is entitled to dower in lot No. 264, it must be assigned to her according to the value of the lot at the time of the alienation.

That her petition can not be sustained, because of the non-joinder of the other persons having the next estate of inheritance in the said other lots and tracts of land.

1. The estate of dower in Ohio, from the organization of the Northwestern Territory, down to the present time, has existed, not by the common law, but as the creature of positive legislation. To determine, therefore, the nature of this estate, in the year 1803, when, by the coverture of the demandant, and the seizin of her husband, her inchoate right to dower attached, we must look to the state of our legislation at that time.

We find in the ordinance of 1787 (the fundamental law under which the Northwestern Territory was organized), this provision:

"That the estates of resident and non-resident proprietors in said territory, dying intestate, shall descend," etc. (here follows the course of descents), "saving in all cases to the widow of the intestate her third part of the real estate for life," etc., and this law relative to descents and dower shall remain in full force until altered by the legislature of the district." 1 Chase's Stat.

*It will be observed that this law is silent as to waste, and [442 makes no provision for the assignment of dower

Next in order is the act published by the governor and judges,

on July 14, 1795 (1 Chase's Stat. 187), adopted from the Massachusetts statute of 1783, of which it is nearly an exact transcript. This adopted law does not profess to alter the provisions of the ordinance as to dower. It is an act "for the speedy assignment of dower, in all lands, tenements, and hereditaments whereof by law the widow is or may be dowable." It continued in force until January 19, 1804, when the legislature of the state passed an act relative to dower, repealing the dower clause of the ordinance and the adopted act of 1795.

I do not stop to inquire whether the title to dower is to be fixed by the law in force at the time of the seizin and coverture, or at the time of the alienation by the husband, or at the time of the death of the husband, as it is admitted by the counsel for the defendant that the law in force in 1803 is the law of this case. The law in force at that time was the ordinance of 1787, creating the estate, and the adopted act of 1795, providing for its speedy assignment. To which of these are we to look, in settling the question of what lands the widow was then dowable? Unquestionably to the ordinance. That creates and defines the estate, whilst the act of 1795, by its very terms, provides the remedy for asserting the right in all lands, etc., whereof by law the widow is or may be dowable, and limits the mode of enjoyment, or tenure of the estate, by the penalty of forfeiture or strip for waste. It proceeds upon the existence of an antecedent and subsisting law of dower, which could only be the law of the ordinance, for that took the place of the common law.

Before we again recur to the words of the ordinance, it is proper to look at the condition of the country to which its organic legislation was intended to apply. The Northwestern Territory was then a wilderness of forest and prairie, with scarcely a cultivated spot in its vast extent. Large tracts of this country had become the property of individuals, residing principally in Virginia and the New England states, and the remainder was held by the federal government, for appropriation in bounties to the officers and soldiers of the revolution, residing in the various states, or for sale to individual purchasers. It was in this state of things that the ordinance was passed; a law provisional in its character, intended for a wild and uncultivated country, and to give place, in some of
443] its features (and in this of dower estate *especially) to sub-
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sequent state legislation, and the emergencies of an increasing population.

The words of the ordinance regulating dower are just as comprehensive as those which regulate descents; wherever the right of the heir attaches by descent to real estate, the right of the widow also attaches—there is no separate clause giving the dower as an independent estate, by peculiar language; but it is annexed to all the real estate, subject to descent, and carved out of it. "The estates of resident and non-resident proprietors in said territory shall descend," etc., "saving in all cases, to the widow of the intestate, her third part of the real estate for life," etc. Now, it will be admitted that the law of descent, at least, applied to the entire territory, the necessary corollary from which is that dower, had a co-extensive application. Lands descended, whether the owner resided within the territory or without; whether they were in forest, or prairie, or under cultivation; and in all cases where they did so descend, the right to dower was saved to the widow.

The counsel for the defendant, in his argument upon this point, merely refers to the ordinance, without comment upon its provisions; and makes the question depend upon the proper construction of the territorial act of 1795, as if that were the law of dower in 1803; and then proceeds to show that the Massachusetts statute, from which it was transcribed, has been constructed by the supreme court of that state so as not to allow the assignment of dower in wild lands.

I admit that, in the construction of a statute adopted from another state, the construction which has been given to it by the courts of that state is entitled to consideration, especially if that construction has been uniform. If the construction has varied in the original state, being one thing at the time of the adoption of the statute, and another thing afterward, which construction is entitled to the most persuasive force, in ascertaining the intent with which the act was adopted? Certainly, that construction which prevailed at the time of the adoption. At the time this act was adopted by the governor and judges of the territory, it had received a construction by the Supreme Court of Massachusetts, in a decision made as early as the year 1783, by which it was held that dower was assignable in wild lands. Nash v. Boltwood, Story's Plead. 366, cited in Webb v. Townsend, 1 Pick. 21.

This construction prevailed at the time of the adoption of the 444] *statute, and whilst the adopted statute was in force in Ohio; and was not reversed in Massachusetts until fourteen years after the repeal of the statute in Ohio. At that late day, A. D. 1818, the Supreme Court of Massachusetts overruled the early construction, and held the widow not entitled to dower in wild land. Conner v. Shepherd, 13 Mass. 164.

The latter construction may be the better one for the Massachusetts statute, and yet the former be the true construction for the Ohio statute; for we may well suppose the governor and judges to have been familiar with the old construction, and to have adopted the act because of the fitness of its application, when so understood, to a country abounding in wild land.

This case of Conner v. Shepherd is, however, so strongly relied upon by the defendant's counsel, that it is worthy of further notice. It has already been shown that this statute did not create or declare the estate of dower, but only provided a speedy mode for its assignment in the lands of which the widow was or might be dowable by law. In ascertaining, therefore, whether under this act the widow should be assigned her dower in wild land in Massachusetts, it is necessary to know the law of that state which creates or defines the right of dower. This law is to be found in the old colony act of 1641. Ancient Charters and Laws of Massachusetts, 99, in the Ohio State Library. This act provides that "the widow shall have dowry in and to one third-part of all such houses, lands, tenements, and hereditaments as her husband was seized of in any estate of inheritance," and that she "shall not commit or suffer any strip or waste, but shall maintain all such houses, fences, and inclosures, as shall be assigned for her dowry, and shall leave the same in good and sufficient reparation in all respects."

It is sufficiently obvious that the language of this act is very different from the large and unrestricted words of the ordinance, and it will be found that the chief justice, in delivering the opinion of the court, in Conner v. Shepherd, places great stress upon the special provision as to waste; and as to the repair of the houses, fences, and inclosures assigned for dower. "This," says he, "is all predicated upon the supposition that the estate has fences and buildings upon it, and is, in fact, in a state of actual

cultivation and improvement." Ib. 168. In the ordinance there is no such predicate for that supposition.

Another ground very much relied upon in that case, and in the case at bar, against the right to dower in wild land, is this: *That to enjoy her dower in such lands, the widow must clear [445 and fence the lands, which would be waste, and work a forfeiture; therefore it can not be supposed that the law has created an estate which would be lost in the use. If we admit the premises, the conclusion does not necessarily follow. The limitation as to waste does not destroy the estate, but only prescribes the mode of its enjoyment. In legal estimation, an estate in lands, especially a freehold, is valuable without reference to its actual user, and it may be so in fact. It may confer civil rights upon the woman, or upon a second husband. Again, we may suggest a variety of beneficial uses to which wild land may be made subservient, without cutting the timber. It may be inclosed with a fence, not made from the timber on the land, and used for pasture, or for a park, or if the trees were "few, and far between," it might be put in corn; though against this last sort of use, the learned counsel for the defendant would no doubt protest, it being the "turning of woodland into arable," which is clearly waste at common law.

But the great error of this argument is in the application of the English doctrine of waste to this country. The definition of waste is, "that which worketh injury or destruction to the inheritance;" and that may be waste in one place, which is good husbandry in another. We find, accordingly, that in England, what is or is not waste, depends upon the different soils and timber, and modes of husbandry, in the different shires. In a highly cultivated country like England, the cutting down of the timber and clearing of the land for cultivation, is the worst species of waste; and it would have been so, to a great extent, in the State of Massachusetts at so late a period as the year 1818; but this can scarcely be said of the immense forest which overshadowed this country in 1787 and 1803. To borrow a very apposite expression from the counsel for the defendant, "this part of the common law never came in contact with an American forest."

Jackson v. Bronson, 7 Johns. 234, was an action for a breach of the covenant against waste. In delivering the opinion of the court, Judge Van Ness says: "It is true, that what would, in England, be waste, is not always so here. The covenant must be con-

strued according to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation." Judge Spencer, in the same case: "The doctrine of waste, as understood in England, is inapplicable to a new, unsettled country."

446] *In Findlay v. Smith and wife, 5 Munf. 134, Judge Cabell says: "The law of waste, in its application here (Virginia), varies and accommodates itself to the situation of our new and unsettled country." Judge Roane, in the same case: "In considering what is waste in this country, it is to be remarked that the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situation and circumstances of the country. That can not be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land, in such circumstances, would not be a lasting damage to the inheritance, nor a disinherison of him in the remainder, which is the true definition of waste. It would, on the contrary, be beneficial," etc.

So in North Carolina: "It is not waste to clear tillable land for the necessary support of a family, though the timber be destroyed in the clearing, nor to cut wood for fences," etc. 2 Hayw. 110; Ib. 339. And in 3 Yeates, 261, the court say, "It would be an outrage on common sense to suppose what would be waste in England, could receive that appellation here."

We find that this ground, so much relied upon in Conner v. Shepherd, is neither supported by reason nor authority, and we may fairly claim that the case itself, and those which are said to follow it in Maine and New Hampshire, is entitled to no weight in the construction of our statute, even if we had no authority to the contrary. But we have such authority. In Jackson v. Sellick, 8 Johns. 270, it is held that the estate by the courtesy attaches to wild lands; and as to waste, Chief Justice Kent observes: "We must take the English rule with such a construction as the peculiar state of new lands in this country requires." The estate, by the courtesy, is a sort of correlative to that of dower, though not so favorably regarded in the law. Co. Lit. 32, 36.

In Walker v. Schuyler, 10 Wend. 480, dower was claimed in

lands which were wild and uncultivated at the time of the alienation. The case was much contested as to the question of value, and it seems not to have been doubted that the right to dower attached. See also Findlay *v.* Smith, 6 Munf. 164.

*In conclusion of this branch of the case, it is well to no- [447
tice the suggestion of the counsel for the defendant, that the prevalent opinion of the bar in Ohio is against the right to dower in wild land. The learned counsel is certainly mistaken in this particular. The prevalent opinion of the profession (so far as our experience goes) is quite the other way.

2. We now come to the second point made by the defendant, which is, that if the demandant is entitled to dower in lot No. 234, it must be assigned to her according to the value of the lot at the time of the alienation by the husband, excluding its present advanced value from the computation, whether resulting from the improvements of the defendant, or from extrinsic causes.

The rule of value in the assignment of dower, where there has been a change of value since the alienation, is of great importance; and if it were an open question, would require a thorough investigation—but it is not. The very point was made and decided by this court in Dunseth *v.* Bank of United States, 6 Ohio, 76. It was solemnly decided in that case that the value *at the assignment of the dower*, exclusive of the improvements made on the land by the purchaser, was the true value. The counsel for the defendant is not understood to complain of that decision, or to ask the court to reconsider it; but he seeks to avoid its effect by distinguishing it from the case at bar. The supposed distinction is in the fact that the Dunseth lot was *partially improved*, and the lot in this case *wholly improved*, at the time of the alienation. I admit this dissimilarity in the facts of the two cases, but I can not see that it has anything more to do with the *principle* decided, than the further dissimilarity of the location of the lots, the one in Cincinnati, the other in Columbus, has to do with it.

In the argument of this branch of the case, we must take it for granted that the widow is entitled to dower in wild land—and the next question is, how is it to be assigned? What is to be the rule of value? In the Dunseth case, this court declare *generally*, that dower must be assigned as of the value at the time of the assignment, excluding the purchaser's improvements. The court states no distinction is to be observed when the lands were *unimproved* at

the time of the alienation; they do not fix one rule for improved, and another for unimproved; but they establish a *general rule*, applicable in all cases where there is an advance in value after the 448] alienation. If the land were improved *at the time of the alienation, and its value has advanced by reason of further improvements and other causes, or, if being so improved at the time of the alienation, its value has advanced without further improvements, by reason of other causes; or, if being unimproved at the time of alienation, its value has advanced in consequence of improvements and other causes; or, finally, if being so unimproved its value has advanced without any improvements from other causes—in all these instances (of which the case at bar is the third in the order of statement), the rule applies. The reason of the rule is, that the widow is justly entitled to the advanced value, extrinsic of the alienee's improvements. Such improvements are not made an integer in the calculation of value; consequently the simplest and most obvious application of the rule is in the instance of land unimproved at the time of alienation, and of the assignment; and it is evident that the most difficult instance in which this extrinsic value is to be ascertained, is (as in the Dunseth case) where it is confused with improvements made before and since the alienation.

But if the question settled in Dunseth *v.* Bank United States is to be again considered, it will be found that the decision is not only conformable to reason and justice, but to the weight of authority. First, as to the English cases: Chief Justice Tilghman, in Thompson *v.* Morrow, 5 Serg. & Rawle, 291–295, and after him, Mr. Justice Story, in Powell et ux. *v.* Morrison et al., 3 Mason, 374, have declared that no decided case is to be found in the English books upon this question. In considering it, therefore, upon the English cases, the argument must proceed upon analogies.

These analogies are very fully stated in Coke on Littleton, 32 a, and the corresponding note, No. 193, of Hargrave and Butler, and they are these:

"If the *heir* improve the value of the estate descended, the widow is to have her dower according to this improved value, and not according to the value as it was in her husband's time; and the reason given for this is, that her title is to *the quantity* of the land, *i. e.*, one just third part.

"If the value be impaired in the time of the heir, the widow

shall be endowed according to the depreciated value at the time of the assignment.

"If *the feoffee improves by buildings*, yet dower shall be as it was in the seizin of the husband, for the heir is not bound to warrant, except according to the value as it was at the time of the *feoffment, and so the wife would recover more against [449 the feoffee than he would recover in value, which is not reasonable."

From these instances, the following principles are deducible: The value at the time of the alienation is not the standard of value. If it advance merely by the improvements of the heir, the value at the time of the assignment is to be regarded. If it advance merely by the improvements of the feoffee, with warranty, the value at the time of the alienation—in other words, the value without these improvements—is the rule. An appreciation of value from other causes than improvements on the land is not put; but a depreciation from general causes is put, and is said to change the rule of value from what it was at the alienation to what it is at the assignment. If the widow is to suffer the consequence of depreciation from general causes, why should she not enjoy an appreciated value from the like causes, especially when it is recollected that her title is *in quantity to one just third part*, and that this increase does not spring from the labor or capital of the alienee?

Again, the feoffee's improvements are not to be taken from him, because the warranty, upon the faith of which he improves, will not cover his loss. If this were the only reason for this rule, it would seem to follow, that where the alienee of the husband has no warranty, but without reliance of that kind goes on to improve, that then, like the heir, he improves in his own wrong, and the widow has the benefit of his labor. But a further reason is given in other books, which is, that to allow the widow to participate in such improvements, would tend to discourage them, and be against public policy. This reason does not hold in the case of increased value from extrinsic causes. We may, therefore, very safely conclude that if this question had arisen in England, the decision would have given the widow her just share in such fortuitous appreciation. In the latest English treatise on dower (Park on Dower, 117, 11 Law Library), it is said: "With some apparent dereliction of principle, we find it asserted by Perkins, that buildings or other

improvements made by the alienee of the husband, shall not be included in computation of value on the endowment of the wife." This "dereliction of principle," as will be seen in the context, is the departure, in this instance, from the uniform favor which the common law shows for dower, and the nature of the estate. Mr. Park then refers to a case, as sustaining the assertion of Perkins, in the book of assize, which was, "that a woman demanded dower 450] of the third *part of land, and the tenant said he bought the land of her husband, not being built upon, and that he builded upon it, and she had judgment of the third part, *salvis edificiis;* and it is added with some inconsistency, and no damages, because the land was amended by building upon it." This case favors the idea that the value, not arising from improvements, was taken into the account. The judgment was not for dower, as of the value at the time of the alienation, but of the value generally, *salvis edificiis*, so that nothing but what the tenant "had builded upon it" was excluded in the value assigned. Mr. Park next states the rule giving the widow the value of the improvements made by the heir, and in remarking upon the supposed distinction between the heir and alienee, he says, "It is difficult to find any satisfactory reason for the distinction. A house, erected upon another man's land, becomes attached to, and parcel of the freehold, and ensues the title of the land; and if it shall go with the land to the person absolutely entitled thereto, it is not easy to understand why it shall not also become subject to particular interests in the land. The understanding of the profession, the author believes to be, that the wife shall be endowed of the land, as she finds it at the time of her title of dower consummated." This time, of title consummated, is obviously used as synonymous with the time of dower assigned, as appears from the case in Coke Lit., cited in support of it, which is, that when the value is impaired, she shall be endowed of the value at the time of the assignment.

From this view of the English cases, it appears that a doubt exists as to the right of the widow to the improvement of the alienee, whilst all the analogous cases establish her clear right, at the time of the assignment, to the value from every other cause.

The attention of the court is now requested to the American decisions; and first, to those relied upon by the defendant's counsel. He claims that the point is definitely settled against the widow, in New York, Virginia, and Indiana, by the cases of Walker v.

Schuyler, 10 Wend. 480; Tod *v.* Baylor, 4 Leigh, 498, and Wilson *v.* Oatman, 2 Blackf. 223.

The case in 10 Wend. is the last of a series of New York decisions upon the question of increased value in the assignment of dower. Two of these cases, Humphrey *v.* Phinney, 2 Johns. 484, and Hate *v.* James, 6 Johns. Ch. 258, are upon the question as to the improvements made by the alienee; and the remaining case, Dorchester *v.* Coventry, 11 *Johns. 510, and this case in [451 Wendell, are upon the precise question of value from extrinsic causes. In New York, they have statutory provisions upon which these cases proceed, which specially exclude all improvements since the sale; so that any opinion expressed in those cases, as to the common law rule, is merely the *dictum* of the judge. Two of the cases were decided by Kent, as chief justice and chancellor, and although he expresses the opinion, that, at common law, the widow would not take the improvements made by the alienee, he expresses no opinion as to her right to value from other causes, but carefully saves that question. Hale *v.* James, 6 Johns. Ch. 258.

The case of Dorchester *v.* Coventry, 11 Johns. 510, was decided, or rather the opinion was delivered by Chief Justice Thompson. It was held that the widow was not entitled to any increased value, but the opinion was grounded on their statute, which was construed to apply as well to extrinsic value as to the improvements of the alienee, and no opinion is given as to the common law rule.

In the case of Wendell, Chief Justice Savage also recites the statutes, and founds his opinion upon them. In reference to the right of the widow at common law to the value arising from other causes than the improvements of the alienee, he says: "I am not to inquire. It is sufficient for my purpose that in this state the widow's rights have been frequently adjudicated under a statute like the present statute, and we are not at liberty to depart from the construction that has been given to it." Ib. 486. The chief justice then proceeds in some remarks *obiter*, to suggest some difficulties in the application of the rule which would give the widow the benefit of the value arising from extrinsic causes. This is the sum total of the New York cases.

In Tod *v.* Taylor, 4 Leigh, 498, the distinct question was upon an objection to the decree below, directing the dower to be allotted according to the value, with all the improvements made by the purchaser. The court are unanimous in the reversal of the

decree; but upon the question of increased value from other causes (which was out of the case), they differ in opinion. Judge Carr (with whom Judge Cabell concurred), says that he "considers it the clear rule of the common law that the widow is not entitled to dower according to the improved value of the land, but must take her dower according to the value at the time of the alienation." He refers to the following authorities: Fitz., Abr., tit. 452] Dower, sec. 192; Perkins, tit. Dower, sec. 328; *Harg. Co. Lit. 32, a, n. 8; 1 Rep. on Prop. 346; 4 Kent's Com. 64; Humphrey v. Phinney, 2 Johns. 484; Hale v. James, 6 Johns. Ch. 258. These authorities do not support the position, if the judge means by "the improved value" anything other than the improvements of the alienee; and even when so limited, it is by no means "the clear rule of the common law."

Judge Tucker says: "I think the law very clear, that in laying off the dower, improvements made by the purchaser should be excluded from the estimate, except that improvement in the productive character of the soil, which arises from the course of husbandry. In like manner, I am of opinion that the accession of value, arising merely from the progress of society, and the general progressive increase in the value of lands, consequent upon increasing wealth and population, can not be thrown into the scale of the purchaser, or diminish the quantity of land to which the widow will be entitled. But on this point my brethren differ from me." Ib. 516.

The only remaining case, of those relied upon by the counsel for defendant, is Wilson v. Oatman, 2 Blackf. (Ind.) 223. The question in this case was also exclusively as to improvements made by the purchaser. Not one word is said on the other question. Judge Blackford says: "If the improvements made by the purchaser, subsequently to his contract and possession, were to be taken into consideration in the estimate of dower, in cases like the present, the rule would tend to discourage the making of improvements, and would be contrary to the policy of the country."

Having now gone through all the American cases relied upon by the defendant, we will go to those upon which the demandant relies.

The first in chronological order is Gore v. Brazier, 3 Mass. 544, which contains a dictum of Chief Justice Parsons. It is this: "If the husband, during coverture, had aliened a real estate in a com-

mercial town, and at his death the rents had trebled from various causes, unconnected with any improvements of the estate, and the widow should then sue for dower, perhaps it would be difficult for the purchaser to maintain that one-ninth only, and not one-third part should be assigned to her."

The next case is Thompson *v.* Morrow, 5 Serg. & Rawle, 289, in which the precise question which we are now considering was made, twice argued, and decided by a unanimous court, in an opinion delivered by Chief Justice Tilghman, in which *every authority and dictum, English and American, hav- [453 ing any bearing upon the question, were carefully considered. The dower was claimed in a lot in the city of Pittsburg, which, after alienation, was increased in value by the erection of buildings upon it, and greatly enhanced, besides, by the growth of the city, and other causes distinct from any buildings or improvements made by the purchaser. It is impossible to do justice to this opinion, or to convey the force of its continuous reasoning by any extracts. I shall, therefore, make none, except of the conclusion, in which the learned judge says: "Having considered all the authorities which bear upon this question, I find myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is, that the widow shall take no advantage of improvements of any kind made by the purchaser; but throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her." It will also be observed that at page 293 the judge states that, although the point had not been decided in Pennsylvania, the general understanding was, that the widow should have the increase of value not arising from improvements made after the alienation, and that his deceased colleagues, Judges Yeates and Brackenridge, were of that opinion.

Since this decision, the same point came up in the case of Powell et ux. *v.* Morrison and Brimfield Manufacturing Company, 3 Mason, 347, before the Circuit Court of the United States, in the Massachusetts district. Mr. Justice Story examines the question with more than his accustomed ability, availing himself of every light furnished by the English and American books, and arrives at this result, which I give in his own words: "Upon the whole, my judgment is, that dower must be adjudged according to the value of the land in the controversy at the time of the as-

signment, excluding all the increased value from the improvements actually made upon the premises by the alienees, leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements." Ib. 375.

Finally, we are enabled to add to these decisions the opinion of Chancellor Kent, as stated in his Commentaries, upon a full review of all the cases, that "the better and more reasonable general American doctrine upon this subject is, in his apprehension, that the improved value of the land from which the widow is to be excluded in the assignment of her dower, even as against a 454] *purchaser, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic and general causes." 4 Kent's Com. 67.

How, then, does the rule as to appreciated value stand as an American question?

In favor of the construction claimed by the counsel for the defendant, there is but one decided case (10 Wend. 480), and that founded upon peculiar statutory provisions, and the *dicta* of Judges Carr and Cabell, of Virginia.

In favor of the construction claimed for the demandant, we have two decided cases of high authority, followed by a solemn decision of this court in bank, and sustained by the *dicta* of Parsons, Tucker, Yeates, Brackenridge, and Kent.

We feel, therefore, a strong assurance that the decision in Dunseth *v.* Bank of the United States will not be overruled. It was well considered and well decided. It has settled a question of title which ought not to be disturbed; and it is sustained by authority and reason, and the opinions of the ablest lawyers of our country.

Assuming, then, the rule established in that case to be the rule according to which the demandant's dower is to be assigned, upon what principles is it to be applied?

In Dunseth *v.* The Bank, the application of the rule was very simple. A single lot in Cincinnati had been conveyed by the husband, and the question was between a remote alienee of the entire lot and the widow, and such was the case before C. J. Tilghman. All that was necessary in those cases was to deduct from the entire value of the lot the value of the improvements made upon the lot. But in this case, dower is claimed in lot

No. 264, parcel of a tract of 320 acres, which was entire at the time of alienation by the husband, and has since been divided into lots, sold to numerous purchasers, and improved by them.

This subdivision has changed the nature of the estate, so that the widow, instead of taking her dower of the entirety, is compelled, as will be seen in considering the third point, to go against each assignee, and take her dower separately in each parcel. We admit that, as to each tenant, she is not to be endowed to the value of his lot, so far as that value arises from the improvements put upon it. We claim that she is to have the benefit of the value arising from all other causes, proximate or remote, whether resulting from the improvements made upon *other lots of the original 320 acres, or from improvements [455 upon the adjoining lands, and from general causes affecting the whole country.

Langdon, the mortagee, was the original purchaser; he made no improvements. In 1809, Starling became the purchaser of the entire tract of 320 acres. It does not appear that whilst he held it *in solido*, any improvements were made. In 1811 and 1812, Starling, in conjunction with the owners of the adjoining lands, laid out a town, about one-half of which was upon the west end of this half section, which was subdivided into lots, streets, alleys, commons, public grounds, etc.

How did the laying out of the town, the division into squares, lots, etc., affect the rights of the widow? If labor and capital were expended, then a proper deduction for that labor and capital is to be made. But it does not appear that this division of the estate was attended with any other expenditure than the donation of public ground. In that expenditure, the land of the widow was made contributory; for this court has decided that the appropriation of streets, public places, etc., in a town plat, to public uses, extinguishes dower. Gwynne et ux. v. Cincinnati, 3 Ohio, 25. The widow must bear a proportional loss by this extinguishment of title in public places; shall she not have her proportional gain in the increased value of what remains?

Where the purchaser preserves the estate entire, and gives it additional value from his labor and capital expended upon it, it is reasonable that the widow should be excluded from that increase;

but where he benefits one part of the estate by the destruction of another, a very different case is made.

The laying out of a town upon a tract of land incumbered with dower (if we except the modicum of labor and capital required in the survey, etc.), is not the class of improvements to which the cases refer. These are actual improvements in the usual acceptation of the term—the result of labor and capital expended; whilst this is nothing more than a division of the land by imaginary lines—an appropriation of it to a particular use—the result of judgment or speculation, depending, in a great measure, for its success upon general causes, over which the purchaser has no control. Even in the case of the amelioration of the land by good husbandry, Judge Tucker was of opinion that the widow was entitled to the increased value. Tod *v.* Baylor, 4 Leigh, 516.

456] *Suppose this application to have been made after the town was laid out, but before the improvements were begun, how would the dower have been assigned? If it were impracticable to assign by metes and bounds, how would it have been as to value? Should the widow only have had the actual value of lot No. 1, as a tract for farming purposes (for which it had been made unfit), or should she not have had the value as a town lot? Starling could have had no just ground of complaint by reason of such an assignment. The accidents of a good site, a neighboring river, a central position, its consequential selection as the seat of government, and many others, result alike to the benefit of all who have an interest in the estate.

But after the town was laid out, Starling conveyed the unimproved lots to different persons, by which act of severance he has compelled the widow to seek her dower against each tenant in his particular lot. The question, after such *ex parte* partition, is between the widow and the tenant; as between Mrs. Allen and Robert W. McCoy, what, then, is the proper rule of assignment? He received the title to his lot with this incumbrance upon it. His lot was then unimproved, and he has since expended labor and capital in buildings, which have added to its value. Mrs. Allen, we admit, is not to have the benefit of that increase of value. It has also appreciated from other causes, such as the erection of public buildings by the state; the construction of a canal by the state, and of a road by the federal government; the general settlement and improvement of the country; the improve-

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ments made in those parts of the city which are without the limits of the original half section; and, finally, the improvements made upon lots of individuals in those parts of the city within the half section.

We claim for Mrs. Allen the benefit of all these causes. If she had any other interest in the lot than a dower interest, it could not be denied to her; why should a dower interest be less favorably regarded than any other incumbrance?

No wrong is done to Mr. McCoy by such assignment. If we take the value produced by his labor and capital, we take from him what is his own; but if, not demanding that, we take the value produced by general causes, or that which is reflected upon his lot from the improvements of his neighbor, we draw upon a fund to which we have an equal right.

The defendant's counsel puts a case, to show the injustice of allowing, in the aggregate of value, so much as arises from other *improvements on other lots *within* the half-section. The [457 error in his statement is, that the improvements made upon lot No. 49, are supposed to be taken into the account in estimating the value of No. 50; and *e converso*, in estimating the value of lot No. 49. It is not the *actual* value of the improvements upon No. 49, but the value which they reflect upon No. 50, which is considered. If a house is built upon No. 49 worth $10,000, which adds $100 to the value of No. 50, the widow, in common with the owner, has her share in this $100. She takes no part of the $10,000 of actual value, either then or when she comes for her dower in No. 49, but a mere incident or consequence of that improvement; and so, by going through the town, she does not, as is supposed by counsel, "actually reap the benefit of all the improvements on all the lots."

Where the estate remains entire, and her dower is to be assigned of the entirety, if one part is improved by the alienee, and thereby another part is rendered more valuable, it might be said that she shall not have the benefit of this reflected value, for that would be taking from the defendant the result of his own labor; it would diminish the fund produced by his own industry. Such a case is put as a difficult question, by Judge Story, in Powell et ux. v. Morrison, etc., 3 Mason, 373. But where, as in this case, the entirety of the estate is destroyed, and her dower is broken up into fragments, the defendant can only claim an exemption for his

own improvements. The widow has a separate estate in each lot, and the value arising from the improvements on the adjoining lot is, *quoad* that estate, extrinsic.

Besides, it would be found to be impracticable to make a deduction for this reflected value. It is too shadowy, too much confused with the general extrinsic causes of value, to be detected and estimated. The plain rule, and that which works no injustice, is to estimate the present value of the lot, as if it were vacant.

3. The remaining point made by the defendant is, that the petition can not be sustained because of the non-joinder of the other persons having the next estate of inheritance in the said other lots and tracts of land.

We hold that such a bill (if it were practicable in a case like this, where the population of a city must be made parties) would be clearly multifarious.

Sections 9, 10, and 11 of the dower act of 1824) 2 Chase's Stat. 1316), point out the mode of proceeding.

458] *Section 9 gives the remedy by petition in chancery, "against the heir or other person having the next immediate estate of inheritance."

Section 10 provides for an *incumbrancer*, by mortgage or judgment, upon the estate, whose rights, being shown by cross-bill, shall be regarded.

Section 11 provides that where the lands lie in different counties, the petition for dower shall be preferred in the county in which the principal messuage is situated, and the court of common pleas "may order the whole dower of the widow to be assigned in any one or more of such counties, and out of any one or more tracts of land, if the same *may be done* without prejudice to the rights of any person claiming title to, or holding a lien on such land."

From these provisions, it appears that in the case of an *incumbrance*, which does not sever the estate, the petition may be filed against the heir, or other person having the next inheritance; but the case of an *alienee* of part of the estate, who holds *in severalty*, is not specially provided for. Cases might be put in which, where the lands or estates (for the statutory use of these terms is synonymous) lie in different counties, and one estate is held by an *alienee*, and the others remain with the heir *in solido*, the

assignment upon a petition against both, might be made under section 11, "*without prejudice to the rights*" of such alienee. And in such cases, for the convenience of the petitioner, the joint proceedings might be sustained. But this is not one of those cases. Here it does not appear that any one of the estates, or any part of any one, is yet in the heir; but the entirety of the estate has been long since destroyed, and instead of seven distinct estates, as at the time of alienation, there are now perhaps seven hundred.

It is not thought necessary to extend this argument by a suggestion of the interminable delays and perplexities, to which a joint petition against all the persons having the next estate of inheritance would necessarily lead. It is sufficient to refer the court to the case of Fosdick *v.* Gooding et al., 1 Greenleaf, 45, where the question is fully considered and decided against such joint proceeding.

The argument thus far was written when the original case was before the court two years ago. The opinion of two out of the three judges who then sat in the case, as it is recollected by counsel, affirmed the rule in Dunseth *v.* Bank United States, *that the value at the assignment, exclusive of the improve- [459 ments made on the land by the purchaser, was the true value. The same question is again presented to the court upon the bill of review.

The argument of the opposite counsel upon the bill of review presents an abstract of the decisions in nearly all the states of the Union upon the subject of dower. Upon a reference to those cases, I am warranted in saying, that except in the states in which the rule of assignment is fixed by statute, there is but one case to be found (Tod *v.* Baylor, 4 Leigh, 498), in which it has been held that the widow is not entitled to the enhanced value, excluding the improvements of the alienee—and in that case the court was divided.

I shall not repeat what has been already said as to the cases in Massachusetts, Maine, New York and Pennsylvania, nor refer to the cases in New Hampshire, which stand upon a statute. The decisions in the other states are referred to by Mr. Wilcox in the following order:

New Jersey.—Pennington, 513, is cited as showing "that the widow could recover no more than the value of the third part of the land at the time of the alienation." That case merely de-

cides that the widow is not to be endowed of the improvements made by the purchaser subsequent to the alienation.

SOUTH CAROLINA.—2 Hill and 1 Baily are cited. The language of the court in 2 Hill is quoted from 1 Baily as follows: "The reasonableness and correctness of the rule, that dower shall be assigned according to the value at the time of the alienation, is so clearly established by principle and authority as to supersede all reasoning upon it."

This is not the language of the court in the case in 1 Baily, but merely a quotation by the court of what had been previously held in 2 Hill. Here is what is said by Judge Nott, in delivering the opinion in Baily, 277:

"As to the time to which the value of the land shall have reference, in the case of Russell *v.* McGee, 2 Hill, 256, it is said: 'The reasonableness and correctness of the rule, that dower shall be assessed according to the value at the time of the alienation, is so clearly established by principle and authority as to supersede all reasoning upon it.' But that opinion is in reference to the improved value afterward, without any question having been made
460] with regard to the respective value at the time of *alienation, and at the time of the assignment of dower, and therefore may be understood to relate to the condition of the lands, rather than the value; and it would appear to me to be a more correct rule to value the lands at the time of the assignment; for it is the land itself, and not the value, to which the widow is primarily entitled. If lands are deteriorated by the destruction of buildings, or otherwise, she must take them in their deteriorated state. It would seem, therefore, that the assessment at that time ought to be the true measure of compensation."

INDIANA.—"In this state (says Mr. Wilcox), the provision of *magna charta* has been adopted; and as against the purchaser, the value of the widow's dower is estimated as at the time of the alienation." 2 Blackf. 223, is cited. Upon reference to that case, it will be found that the question was exclusively as to improvements made by the purchaser. The question of appreciated value from other causes is not touched. The language of the court is: "If the improvements made by the purchaser subsequently to his contract and possession were to be taken into consideration in the estimate of dower, in cases like the present, the rule would tend

to discourage the making of improvements, and would be contrary to the policy of the country.

MARYLAND.—This is one of the states in which the opposite counsel could find no decisions as to the rule for estimating the value of the widow's dower.

In 1 Bland's Ch. 231, I find such a decision, in Hannah K. Chase's case. The widow, Mrs. Chase, claimed dower against the heirs in a lot which had been leased by the husband. Chancellor Bland says: "As to the value of the rents and profits, one-third of the rent reserved by the lease to Bryden, and no more, can be recovered during that term. After that time, the actual value must be the criterion. For, as it is said, if a wife be entitled to dower of land worth no more than $5 per acre, and the heir by his industry, or by building thereon, makes it worth $50 per acre, the widow shall have her dower according to the improved value. So, on the other hand, if the property be impaired, she can only recover according to the reduced value. Co. Lit. 32, a. But the heir is entitled to no allowance for melioration or improvements. The account of the rents and profits must be taken according to these principles."

KENTUCKY.—6 J. J. Marshall, 591, and 3 Dana, 348, are cited as establishing the rule that the value at the *time [461 of alienation is the true value. The case in Marshall (decided in 1831) did not involve the question, but, as it might afterward arise in the case, the court say: "If the husband had alienated the land in his lifetime, seizin should be given to the wife of a third in value, according to the condition of the land at the date of the alienation." The authorities cited by the court are: Perkins, tit. Dower, sec. 328; Harg., note 193, Lib., 1 Co. Lit.; Humphrey v. Phenny, 2 Johns. 484; Dorchester v. Coventry, 11 Ib. 512; Shaw v. White, 13 Ib. 179.

The English books are upon the question of improvements made by the purchaser; and the New York cases, as has been shown, are upon a statute.

If, by the "condition of the land," we are to understand the improvements upon it, according to the distinction pointed out by Judge Nott, in 1 Baily, 277, then, as between the widow and a purchaser, there can be no doubt of the correctness of the rule. The value, so far as the state of the improvements is concerned, must be in reference to the condition of the land at the time of

alienation. An appreciation from other causes than a change in the mere condition of the land itself, is what we go for. The case is Mahoney v. Young, 2 Dana, 588, decided in 1835. Mrs. Young applied for dower in lands alienated by her husband to Mahoney. The circuit court had decreed her for dower the one full third part of the whole tract, including the improvements made by Mahoney. The court of appeals held this assignment erroneous. They say: "An estimate should have been made of the value of those improvements, and after deducting the amount from the total value of the whole premises in their present improved state, a decree should have been rendered in favor of the complainant for one-third of the balance so reduced."

All that we have to say of this rule is, that Mrs. Allen will be satisfied with precisely such a decree.

So stands upon authority the right of the widow to partake of the appreciated value arising from other causes than the improvements of the purchaser. In England, it has never been questioned. In this country, wherever, when not settled by statute, it has been touched, with a solitary exception, it is sustained. We shall hardly find a question upon which so many of the great names in American jurisprudence are arrayed upon the same side.

462] *A printed record of seven cases in dower from the county of Hamilton is also presented by the opposite counsel. In one of these, Margaret Dickey v. Trustees of Cincinnati, no decree appears to have been had. Decrees in five of the others were had at two terms—July, 1822, and June, 1824. When it is recollected that about thirty-five terms of the Supreme Court have been held in Hamilton, it seems somewhat singular that the dower decrees of only three terms are presented. Who can say, if this sort of authority—the mere record of the case, in which it does not appear what was argued, or what was submitted to without argument—is to overrule solemn decisions in bank, where are we to stop?

Why are no records brought from other counties? There can be no question but there are hundreds of cases of decrees in dower in other parts of the state; and there is just as little question, that in nine out of ten of these cases, at least, the decree is for assignment according to the value at the time of assignment. It is true, it does not usually happen that the time between the

alienation and the assignment is as great as in the case at bar, nor the difference in value so important; but in this state, especially in the last ten years, there has been a constant appreciation, and even the lapse of a year would make a great difference.

I admit that much respect is due to circuit decisions, when they have been long acted upon, and a uniform practice and understanding have grown up under them. This is not the case with these decisions. The practice has been the other way; and no argument against their notoriety can be stronger than the fact, that the Dunseth case arose in the county of Hamilton, and no notice is taken of these cases, except in reference to what was said to have been held in one of them. The court and the bar seem alike to have forgotten them.

If, then, those cases were not well decided, should they be followed, if the law were now for the first time to be settled in bank? It would be difficult to answer that question in the affirmative. But something more is asked of the court by the opposite counsel. The question is not now for the first time to be settled. A decision in bank has been had—nay, two decisions—and now the court is asked to reverse those decisions, and retrace their steps, that the reported cases may conform to the decisions on the circuit.

*GODDARD and CONVERSE, on the same side. [463

Judge WOOD delivered the opinion of the court:

It is made a question for the defense, whether the proper party defendants are before the court. The objection lies at the foundation of the suit, and for that reason should be first examined and disposed of. If it is well taken, we can not proceed to a decree. Other parties must be brought before us, and we ought to hear them before we decide a principle affecting their rights. This is the more necessary, because we are engaged in re-examining a doctrine that has been settled in this court, and promulgaged as a rule of property. In such a case we are required to proceed with circumspection as well as with deliberation. Possibly new parties may present new views, and if a final decree can not be pronounced without bringing such parties into court, they should be so brought in, and opportunity given them to be heard before any step is taken by which their rights may be compromitted.

The lot of ground, of which dower is sought by this petition,

is separated from a much larger entire tract, which was owned and aliened by the husband in its entirety. In addition to this, that tract is but one of seven separate tracts thus owned, and all aliened at the same time and by the same conveyance.

The statutory provision giving the remedy in chancery directs that the widow may file her petition against "the heir or other person having the next immediate estate of inheritance." It also empowers the court "to render such decree in the premises as shall appear just and consistent with the rights of all the parties interested therein." The same statute empowers the court to assign the dower in the whole of several tracts in any one of them, "if the same can be done without prejudice to the rights of any person claiming title to, or holding a lien on such lands."

The obvious intent of these enactments is to clothe the court with discretionary powers to simplify and expedite the assignment of dower in proper cases. A leading case of this class is, where the next immediate estate of inheritance, in several tracts of land, descends to the heir, between whom and the claimant of dower there is no third party interest. Here the parties in interest and the subjects to be litigated are, in every point, identical. There is great convenience in comprehending all their 464] rights in a single suit. This not only tends to narrow *necessary litigation, it enables the court, very often, to do more exact equity between the parties. The same may be alleged of the single alienee of several tracts of land, who still retains title and possession. The statute embraces these and similar appropriate cases, enlarging the discretionary power of the courts for beneficient purposes. But it never was intended to coerce a joinder of parties, having no privity of estate, no necessary legal connection, and whose interests might be adverse. The inconveniences, nay, the impracticabilities of such a joinder of parties, are familiar to the profession and to the court. Rules of practice have been carefully constructed to prevent these, and we can not agree that their subversion was intended by our statute. Where the heir, or the alienee of the husband has subdivided, and again aliened the estate into separate parcels, the incumbrance of dower follows separately, attaching to each separate subdivision its claim, not proportionate to the whole, but equal to its value in the particular case. Hence we are of opinion that, in this case, the proper parties are before the court.

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The second question, in what seems to the court the appropriate order for considering the points in the case is, can the widow claim to be endowed of lands lying wild and uncleared of timber during the husband's seizin, and at the time of his alienation? This question is raised upon a technical nicety of the common law. One of the incidents attached to a dower estate is its forfeiture for waste, and a prominent act of waste is converting woodland into arable.

Thus, it is argued, dower in wild lands is a useless property. It can be of no value to the widow in its wild state, and it can not be reduced to cultivation without forfeiting the estate itself.

This argument is too subtle to be received as premises for the conclusion it seeks to enforce. The common law doctrine of waste has never been recognized in Ohio, either as an incident of title or as affording a remedy for wrong.

With us, as is justly argued for the petitioner, dower is of statutory creation. It was introduced by our fundamental law, not in the technical, legal phraseology of the old books, but with very little reverence, instead, for either Littleton or Coke, or even Glanville. And it is declared to be of "all lands of which the husband was seized, as an estate of inheritance, at any term during the coverture." This is an enactment of the state *government in [465 the year 1805. Under this statute, dower, in this case, has its origin; for we hold that the widow's right accrued at the death of the husband. The members of this legislature knew the condition of the country; that it existed mostly in wild lands, and they employed the broadest and most comprehensive language to subject "*all*" these lands to the right vested in the widow. Had the waste notion now set up been previously acted upon, it might well be maintained that this statute was worded purposely to introduce a new rule. It is the opinion of the court that wild, uncultivated lands have always been subject to dower in Ohio.

These points, however, are but the outworks of the defendant's case. The great matter in contest is the period of fixing the value and the rule for ascertaining the amount. After many litigations, adjudged upon conflicting principles, both these points were solemnly settled in this court, and the result ordered to be authentically published, for the information of the citizens, in Dunseth v. Bank of the United States, 6 Ohio, 76. We have reheard that case in this, and a majority of the court found themselves satisfied

with it. A further hearing was asked and conceded. We have listened patiently to every new suggestion, and have reconsidered previous arguments. The result is, that a majority of the court is confirmed in the right decision of the Dunseth case.

The counsel have thoroughly searched the whole subject, and placed it clearly before us. It appears that different rules, in respect to dower, have been adopted in different states. That in some it has been hardly agitated, and, in others, very earnestly discussed. In consequence of this, we have felt at liberty to decide upon a rule for our selves.

Before the decision in Dunseth *v.* Bank of the United States, several cases had been prosecuted in Hamilton county. The record statements of some of these cases are presented, as part of the printed arguments for the defendant. Considered in the light we look at them, these cases seem to explain how the rule in Dunseth's case came to be established.

It was about 1822 that the first cases were heard in the Supreme Court of Hamilton county. It is evident from the transcripts that dower was discouraged by the bar, the bench, and the mass of those engaged in the administration of justice. It could not be otherwise, where there would be many claims of dower, for the widows of the pioneers, whose lots of ground 466] *had been passed away, for little considerations, and in great negligence with respect to properly executed conveyances.

The rule declared by the court was, the value at the time of the husband's alienation. The findings and judgments under this rule were not well calculated to keep it in countenance. Thus, in the case of Ewing *v.* Ennis, referred to twelve jurors, their verdict was, that, at the alienation in 1801, the dower interest was worth *nothing;* but at the husband's decease, in 1818, it was of the value of $45 per annum. The widow, under the rule, recovered nothing for her dower. There was too evident injustice in this, and a strenuous effort was made not to allow an extension of the rule beyond the value at the time of the husband's decease. This prevailed for a few cases, but the profession were not satisfied with it. The struggle for value at the time of the demand continued until the whole subject was brought before us in the Dunseth case, in 1833. The decision then made is far from being acceptable to all.

It is a beautiful theme for declamation, but that is out of our province. Much may be said for the widow, and something for

the purchaser in possession. Generally, there is a gentleman go-between, who speculates, at last, upon both, or loses his prey altogether. But the correct rule can look at none of these.

The dower interest of the wife, in all the lands owned by the husband during the coverture, is not of a character to be sprung upon any purchaser or party in possession. The law has taken care to give it a public character, and has provided a mode for its relinquishment. Every purchaser who carefully traces his title, and obtains information of the chain of grantors, under whom he claims, is enabled to ascertain if a dower incumbrance stand out against him. If he delay to extinguish it, the fault is his own. It is no impeachment of the rules of law, or the developments of time and circumstances, if they work together to make his negligence result in a hard case upon his pocket. The case before us is appropriate for explanatory use.

The lands were wild in a wilderness. The widow claimant lived in a far remote country, ignorant of all her rights. When she became acquainted with these rights, it could not be more her duty to demand them, than it was the duty of the party in possession to hasten an adjustment. Can he complain, if, calculatingly, she waited for a great anticipated rise of property, before she fixed her right of amount by a demand? The party in possession can cause assignment of dower. The widow can delay, or hasten *her demand by the appropriate suit. We give the [467 preference to the widow, when both parties have remained inactive.

We lay out of the case the learning, quaint and almost incomprehensible as much of it is, which is displayed in the cases and dogmas cited for the defendant. The citing the heir or warrantor that the covenant of warranty may be tried, and the damages recoverable ascertained, as the rule of value for the dower may be specified. Whilst the court were building up the *nothing value*, in dower, they were adjudging most scorching damages upon covenants of seizin. This matter was set right in 1827, in the cases of Backus' Adm'r *v.* McCoy, and Robinson *v.* Neil, 3 Ohio, 218, 525. And in 1833, Dunseth against the Bank, introduced the rule in dower, to which the majority of the court have determined to adhere.

It is considered that the statute laws of Ohio, from the provision in the ordinance, and running through every enactment to

this day, contemplated dower as a plain unentangled interest of the wife in the real estate of the husband. The remedy given to obtain it, when refused, is made simple and direct. It is all an honest, homespun concern of our own, standing distinct from precedents and analogies of other countries, and upon a basis sufficient to sustain it.

Dissenting opinion, by Judge HITCHCOCK:

The decree which was sought to be reviewed in this case was rendered by this court at its December term, 1836. Differing from a majority of the court rendering that decree, and differing from that same majority in the decision of this case, which goes to affirm it, it seems to be proper, considering the importance of the principle decided, that I should state the reasons which have led me to a different conclusion from that arrived at by my brethren.

The original case was an application by Mary C. Allen, as the widow of George W. Allen, for dower in a certain town lot in the town of Columbus. The facts of the case were not multifarious. In 1801, George W. Allen was possessed of seven half-sections of land in the Northwestern Territory, now situated in the counties of Licking, Fairfield, and Franklin, containing 320 acres each, and being parts of the Refugee tract, so called. In 1803, he intermarried with the complainant. In 1805, he mortgaged the lands to John Langdon, by deed, executed in some of the Eastern states, 468] probably New Hampshire, *and in 1806 died. In 1809, proceedings by *scire facias* were had upon this mortgage, and the lands were sold at sheriff's sale to Lyne Starling. At the time of the execution of the mortgage, and until after the sheriff's sale, the lands were wild and uncultivated. Neither George W. Allen nor the complainant were ever within the Northwestern Territory, nor within the State of Ohio. In the year 1812, Starling, in conjunction with others, laid out the town of Columbus, about one-half of which is located on one of the half-sections mortgaged to Langdon; and in the same year the seat of government of the State of Ohio was established in the town thus laid out. As an inducement to procure the location of the seat of government, Starling and those connected with him in laying out the town, made donations to the state, in land or otherwise, to the amount of $50,000 or more. The defendant owns lot No. 264, in fee simple, deriving title from Starling. Upon this lot large and valuable improvements have

been made, and it is in the heart of the city. The defendant, also, owns two other lots in the city, on which improvements have been made, and he has contributed largely in taxes and otherwise for the general improvement of the place. To recover dower in lot No. 264, the plaintiff brought her suit. Her petition was filed twenty-nine years after the land was alienated by her husband, and twenty-eight years after her right of dower was consummated by his death.

The court decreed in favor of the complainant, and decided that she was entitled to be endowed according to the value of the grounds, at the time of the assignment, excluding increase of value from improvements made by the alienee, but including increased value from other extrinsic and general causes.

To reverse this decree, this bill of review has been filed; and upon the hearing, the bill has been dismissed, thereby affirming the original decree. Believing the decree to be wrong in principle and upon authority, I deem it proper to state the reasons upon which my opinion is founded, and shall do it in as succinct a manner as the importance of the case will justify.

Dower is of ancient origin; so much so, that it is uncertain when it was first introduced into England. By the common law, the wife was entitled to the use, during her life, of one third part of the lands and tenements which were her husband's during coverture. Co. Lit., ch. 5, sec. 36, 37. It is said by the editor of the eleventh edition of Coke's Com. upon Lit., "The *reasons why the law gave the wife dower will appear, if [469 we consider how the law stood anciently; for, by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life; nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by custom, till the statute of Henry VIII." Coke's Com. 31, n. 178, a, 15 Ed. Hence the indulgence with which dower was treated by the courts, and hence the reason why it became coupled with "life and liberty," as the three things which were peculiarly favored in law. But the times have changed, circumstances have changed, and in accordance with the maxim, "that when

the reasons of the law cease, the law itself should cease," this principle no longer exists in England. By the statute of 3 and 4 William IV, it is enacted "that no widow shall be entitled to dower in any land which shall have been absolutely disposed of by her husband in his lifetime or by his will."

In most of the states of this Union, the principles of the common law upon the subject of dower have been adopted, either as the common law of the land or by statutory provision; and the widow is entitled to dower in all the lands of which her husband was seized, as an estate of inheritance during the coverture. The same is the law in this state. In Connecticut, Vermont, North Carolina, and Tennessee, it is different. In those states the widow can only be endowed of the lands of which the husband *dies* seized.

Such being the principle of the common law, as well as the laws of the several states and of this state, if we can ascertain the rule adopted in England and our sister states in the assignment of dower, where lands have been aliened during the lifetime of the husband, it would seem to be proper for this court to adopt the same rule. From the most careful examination which I have been able to give the subject, it seems to me to be clearly established that the rule adopted in such cases in England at an early period, and continued without variation, was that in such case the widow should be endowed according to the value of the property at the time of the alienation by the husband and not at the time of the assignment. With a single exception the same 470] *rule has been adopted in every state in the Union where the common law doctrine of dower has been recognized. The same rule, too, was adopted in this state, and prevailed until the decision of the case of Dunseth *v.* Bank of the United States. 6 Ohio, 76.

As to the case last cited, it seems to me proper to place it out of view as an authority in this case, because that case is now open upon a bill of review and can not be considered as finally disposed of.

But before proceeding further in the investigation of this part of the case, it may be proper to examine a preliminary point made by the claimant's counsel. It is claimed by them that the right of dower in this case, so far as respects the extent to which the widow shall be endowed, depends upon the ordinance of 1787,

which was the law upon this subject in 1803, when the complainant intermarried with her late husband, George W. Allen. If, in this, counsel are correct, it would seem to me there must be an end of the case; for, to my understanding, the ordinance clearly enacts the principles of the laws of Connecticut, North Carolina, Vermont, and Tennessee. It provides that the widow shall be endowed of the lands of which her husband died seized, and it makes no provision for dower beyond this. It is in these words:

"That the estates, both of residents and non-resident proprietors, in the said territory, dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parents, in equal parts, among them; and where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of an intestate shall have, in equal parts, among them, their deceased parents' share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate the third part of the real estate for life, and one-third of the personal estate; and this law, relative to descents and dower, shall remain in full force until altered by the legislature of the district." 1 Chase's Ohio L. 66.

This law makes provision for the manner in which the estate of an individual dying intestate "shall descend and be distributed." His estate can not *descend* until he is deceased, and then only that estate of which he is seized at the time of his death. This law, *too, makes provision for the disposition of the whole estate, [471 both real and personal, and it makes no difference in the manner of the descent or distribution, except as to the widow. "Saving in all cases to the widow of the intestate, her third part of the real estate *for life*, and one third-part of the personal estate." "Saving," what from? Unquestionably from that which is the subject matter of this particular legislation. And that was the estate of which a proprietor, whether resident or non-resident, might die seized. No other real estate could descend, no other personal estate could be distributed, and of no other could a widow, under this law, be endowed. It seems to me, that under the ordinance, there would be the same propriety in saying that the widow should have one-third of the personal estate of which her husband was possessed

during coverture, as one-third of the land of which he was seized during the same period.

It may be remembered further, that in that part of the law in which the shares of the heir and widow are provided for, dower is not named, although it is in a subsequent clause.

If the inquiry should be made why Congress should, by this ordinance, adopt a different rule as to dower, from that adopted at common law and in some of the states in the Union, the answer may be found in the argument of claimant's counsel. "The Northwestern Territory was then a wilderness of forest and prairie, with scarcely a cultivated spot in its vast extent. Large tracts of this country had become the property of individuals, residing principally in Virginia and the New England states; and the remainder was held by the United States for appropriation in bounties to the officers and soldiers of the revolution, residing in the various states, or for sale to individual purchasers." It might be added that three millions and a half of acres of land in this same territory were the property of the State of Connecticut—a state in which the widow was never endowed, except of the lands of which her husband died seized. It was probably foreseen that lands thus owned and thus to be brought into market would become like articles of merchandise, and with almost the same facility as goods and chattels, pass from hand to hand. To establish the same rule as to dower for a country so situated, and for a country too, where, by the same organic law, an individual was allowed to dispose of his real estate by will or deed, would have been highly impolitic. It must, to a great extent, have operated to prevent the alienation of land. For it will be seen by the same section of the ordinance, 472] that although provision is made that "real *estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, by the person, being of full age, in whom the estate may be, and attested by two witnesses," etc., yet no provision is made as to the manner in which a married woman may divest herself of her interest in land, or relinquish a right of dower. It was not until August, 1795, that there was any law in the territory authorizing a married woman to convey land; and then a law for that purpose was adopted from Pennsylvania. 1 Chase's Ohio L. 186. Nor was it until 1804, that provision was made whereby a wife could relinquish dower.

Can it be believed that if Congress, in the adoption of the ordi-

nance of 1787, which was the organic law of the territory, had intended that the wife should be endowed of all the land of which the husband was seized during coverture, they would not have made some provision by which she might release this right? The circumstance that no such provision was made, operates strongly in my mind to lead to the conclusion that they intended nothing further than what the language used imports, that she should be endowed of those lands, and those only, of which the husband was seized at the time of his death.

In this law there was no change until after the organization of the state government. The object of the law of 1795, entitled "a law for the speedy assignment of dower," 1 Chase's Ohio L. 187, is well defined by its title. It does not prescribe to what extent a widow shall be endowed, but the manner in which she shall obtain her dower in those lands in which she is entitled to it.

I have probably taken up more time in the examination of the ordinance upon the subject of dower than was necessary, and more than I should have done, but for the importance counsel have attached to it. Clearly to my mind, under the ordinance, the complainant in this case would not have been entitled to dower, because the land in which dower is claimed, was aliened by her husband in his lifetime.

On January 19, 1804, the legislature passed "an act regulating dower," in which it is expressly provided, "that the widow shall be entitled during her life to the use of one third part of all the real property that her husband was seized of during coverture, unless she shall have joined with her husband in the conveyance." 1 Chase's Ohio L. 395. By this act the common-law principle with respect to dower was adopted, and at the same time that the legislature adopt this principle, they provide the *way in which [473 the wife may relinquish her right, and that is by joining with her husband in the conveyance.

The act of February 12, 1805, upon the same subject, repealed the law of 1804, but did not change the principle as to dower. This latter law was in force at the time the mortgage to Langdon was executed. The petitioner did not join in that conveyance, and I do not, as at present advised, see why under its provisions she is not entitled to dower.

I will not proceed to ascertain what was the rule adopted in England, with respect to the assignment of dower where lands

had been aliened in the life of the husband. At a very early period, a different rule was adopted, where the demand was made of the *heir*, and where of an *alienee* of the husband. In the one case, the widow was to be endowed as of the value of the land at the time dower was assigned; in the other, as of the value at the time of alienation. "If the husband make a feoffment in fee of lands, and the feoffee builds thereon, and improves the same greatly in value, yet the wife of the feoffee shall have dower *only* according to the value in the husband's time." 2 Bac. Abr. 368. "If the heir improve the land by building, or sowing, the wife shall recover her dower with the improvements upon it, because by her husband's death her title to dower was consummated, and the improvements, as to her part, were *quasi* upon the land." Ib. The same principle is laid down in Coke upon Littleton, 32, a, and Hargrave, n. 193 to Coke Lit. 1, says, "if feoffee improve by buildings, yet dower shall be as it was in the *seizin of the husband.*" To sustain which position he cites 17 Hen. 3, Dower, 191, and 31 Ed. 1, Voucher, 288, and adds, "for the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee, than he would recover in value, which is not reasonable." Chancellor Kent, in treating on this subject, says, "In cases of alienation by the husband, the general rule is, that the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent *increased or improved value. This was the ancient and settled rule of the common law*, and the reason of the rule is said to be, that the heir was not bound to warrant except according to the value of the land as it was at the time of the feoffment; and if the wife was to recover according to the improved value subsequent to the alienation, she would recover more against the feoffee than he would recover of the heir. 474] *The reason assigned in the old books has been ably criticised and questioned in this country; *but the rule itself is founded in justice and sound policy*, and whether the land be improved in value or be impaired by the act of the party subsequently, the endowment in every event of that kind, is to be according to the value at the time of alienation, in case the husband sold in his lifetime; and according to the value at the time of the assignment, if the land descended to the heir." 4 Kent's Com. 65, 66. Whether the reasons assigned in the old books for this rule are or are not

satisfactory, is not very material so long as the rule itself "is founded in justice and sound policy."

These authorities, without quoting others, are sufficient to show what the common law rule upon this subject was, and I am not aware that upon this point there is any difference of opinion. They show further that this rule was established as early as 1230, and has continued in force in the country where established more than six hundred years.

The common law principle of dower having been adopted in most of the states of the Union, it was to have been expected that the rules established at common law with respect to its assignment would be adopted; and so we find it. Previous to 1819, not a case has been found in any one of the states, recognizing any other rule than that dower, in case of alienation, should be assigned according to the value of the property "in the seizin of the husband." And even at the present time it is not known that any other rule has been established in any of the states except in Pennsylvania, although perhaps there may be some doubt with respect to Kentucky, in consequence of a decision reported to have been made in that state, as late as in 1833. In making these remarks, I do not forget the case of Powell et ux *v.* Morrison and Brimfield Manufacturing Company, 3 Mason, 347. This was a case decided by Judge Story, in the Circuit Court of the United States, in Massachusetts. Although the opinions of that learned judge will be by me always held in the highest estimation, yet his decisions upon a question concerning the internal policy of a state can not be considered as the law of that state until adopted by its courts, and I do not find that the courts of Massachusetts have followed his decision in this case.

Chancellor Kent, after using the language before cited, proceeds thus: "This is the doctrine of the American cases, and they are in conformity with the general principles of the English law, as to the time from which the value of the dower is to *be com- [475 puted, both as it respects the alienee of the husband and the heir." 4 Kent's Com. 76. In the case of Humphreys *v.* Phinney, the same jurist, in delivering the opinion of the court, says, "The widow is not entitled to dower according to the *improved value* of the land, in case of alienation. This is the rule prescribed in such cases by the act, 4 N. Y. Laws, 616, *and the statute did not, in this respect, introduce a new rule, for such was the law as understood*

and declared in the most ancient decisions of which we have any report." And so it was decided. 2 Johns. 484.

In the case of Dorchester *v.* Coventry, which was also an action of dower, Chief Justice Thompson, in delivering the opinion of the court, after remarking that the case could not be distinguished from that of Humphrey *v.* Phinney, before cited, says, in speaking further of that case, "the language of the chief justice is plain and explicit, that the widow is not entitled to dower according to the improved value, and all the cases referred to as analogous go to establish this point. The statute (1 N. Y. L. 60) can not admit of any other reasonable interpretation. *It declares that the dower of any land sold by the husband shall be according to the value of the land, exclusive of improvements made since the sale.* And it can not be presumed that the legislature intended to make a distinction between improvements and the increased value of the land. *The same principle applies to both.* 11 Johns. 509.

Before leaving this case, it may be proper to remark that precisely the identical principle, which is contended for in the case now before the court, was contended for in the case of Dorchester *v.* Coventry, and that principle is this: that although the widow is not entitled to the benefits of improvements made by the alienee, yet she is entitled to the benefit of the increased value of the land from extrinsic causes. And the dictum of Chief Justice Parsons, in Gore *v.* Brasier, was relied on by the counsel for the plaintiff. Still the court did not see the force of the distinction, but say expressly "that the same principle applies to both."

It is argued, however, by counsel that this authority must be disregarded, because the courts in New York are governed by the statute of that state, and not by the principles of the common law. Chief Justice Kent, in the case of Humphrey *v.* Phinney, says, and surely he ought to know, "the statute did not in this respect, introduce a new rule, for such was the law as understood
476] *and declared in the most ancient decisions of which we have any report."

I have not the statute of New York before me, but according to the statement of Chief Justice Thompson, in Dorchester *v.* Coventry, before quoted, "it declares that the dower of any land sold by the husband shall be according to the value of the land exclusive of improvements since the sale." What is the rule of the common law? "If the husband make a feoffement in fee of

lands, and the feoffee builds thereon, and improves the same greatly in value, yet the wife of the feoffor shall have dower only according to the value in the husband's time." 2 Bac. Abr. 368. Or according to Chancellor Kent, "the widow takes her dower according to the value at the time of alienation, and not according to its subsequent increased or improved value." "This," says he, "was the ancient and settled rule of the common law." 4 Com. 65. Now if there be any substantial difference between the rule as prescribed by the statute of New York, and the common law rule, I must confess I can not see it. The statute prescribes that "dower in land sold, shall be according to the value of the land, exclusive of improvements since the sale." The common law says that "the widow takes her dower according to the value at the time of alienation, and not according to its subsequent increased or improved value." Where is the difference? If there be any, the statute is more favorable to the widow than the common law. But the courts in New York say there is none, and it appears to me that in this they are correct. The truth is, in that state, the rule of the common law has been embodied in their statute. The rule remains the same, and it is in vain for the counsel to attempt to evade the authority of the cases in that state, by saying they are the mere constructions of a statute.

The same question came before the Supreme Court of the State of New York, in the case of Dolf *v.* Basset, decided in 1818, and the court again held that "dower of land aliened by the husband, in his lifetime, is to be assigned according to the value of the land at the time of alienation. 15 Johns. 21.

Again, the same court had the same subject under consideration in the case of Walker *v.* Schuyler, decided in 1833. 10 Wend. 480. The great question in this case, as well as in that of Dorchester *v.* Coventry, was whether the widow was entitled to the benefit of the increased value of the land not arising from the improvements made by the alienee, and the court held that she was not; thereby sustaining their former decisions.

*In the case of Shaw *v.* White, 13 Johns. 179, the court [477 say, "the widow does not have the benefit of improvements, *or of the increased value of the land.*"

I will refer to one more case, and only one more in New York, and that is the case of Hale *v.* James, 6 Johns. Ch. 258. And this case is referred to the more particularly because it was a case

decided by Chancellor Kent, and strong reliance is placed upon the opinions of that jurist by the complainant's counsel, to sustain themselves in the position which they assume in this case. This case was decided in 1823. It was a petition for dower. The land had been mortgaged in 1814, the equity of redemption was released in 1817, the defendant took possession in 1819, and the husband died in 1821. It was held that as the mortgagee continued in possession after the mortgage was executed, the alienation did not take effect until 1817, when the equity of redemption was released. In 1817, the lands were worth $7,333, and in 1821, $6,166. The defendant insisted that the widow should be endowed according to the value of the land in 1821, when the husband died, and her right of dower was consummated. But the chancellor held otherwise. He says, "the rule is fixed and steady, that whether the land be improved in value, or whether it be impaired in value in the time of the heir, the endowment is still to be according to the value at the time of the assignment. And why should not the rule be equally fixed in the present case? There is no color for the suggestion in the books, that the time is unsettled, and depending upon the volitions of either party. The rules of law are not subject to such alterations; and *it is settled*, from time immemorial, and on principles of justice and sound policy, that the value of dower in case of alienation by the husband, is to be taken at the time of alienation, and not subsequently, and the rule is not to be disturbed to suit the views of one party." It must be borne in mind that the value of these lands had depreciated, still the widow took her dower, not according to this depreciated value, but according to the value at the time of alienation. If she is allowed to take in such case according to the value at the time of alienation, shall she not be *compelled* to do it when the land has increased in value?

The chancellor concludes his remark upon this part of the case by saying: "Take one case with another, the land is more likely to increase than to diminish in value; because land is almost everywhere, in this country, in a state of rapid improvement, and the widow would be the gainer, in most cases, over the purchaser, 478] *if we had it in our power *to dislocate the rule of computation*, and transfer it from the time of alienation to the time of the death of the husband."

These authorities are certainly sufficient to show that in New

York, at least, the law is well settled, that a widow shall be endowed according to the value of the land at the time of the alienation, without taking into the computation any increased value, whether arising from improvements made upon the land subsequent to the alienation, or from other extrinsic causes.

The same principle prevails in Massachusetts, 9 Mass. 8, 221. In New Hampshire, 2 N. H. 56. In New Jersey, Penn. 513. In South Carolina, 2 Hill, 256; 1 Bailey, 281. In Indiana, 2 Blackf. 523. In Virginia, 4 Leigh, 509.

The case of Tod *v.* Bayler, 4 Leigh, 509, was decided in the court of appeals of Virginia in 1833. The cases of Thompson *v.* Morrow, 3 Serg. & Rawle, 291, and Powell and wife *v.* M. & B. Manufacturing Co., 3 Mason, 375, were before the court and relied upon by counsel in argument. Still the common law rule was adhered to. Judge Carr says, "I consider it the clear rule of the common law, that where the husband aliens during coverture, and the widow claims dower after his death, she shall not be entitled to dower according to the improved value of the land, but must take her dower according to the value at *the time of the alienation.*" If she takes according to the value at the "*time of the alienation,*" and this is the language of Kent and other writers upon the subject, surely increased value, no matter from what cause it arises, is excluded from the computation.

Having thus ascertained the rule which has been established at common law, and in several of the states, for the assignment of dower where the land was aliened by the husband, it may not be improper to inquire what principle has been adopted in this state upon the subject. Considering our circumstances, and the situation of our country, it is not to be expected that many cases should have arisen in which a question like the one now under consideration would be involved. The state is new, and it is but as yesterday that the whole country was covered with the forest. In such situations, dower-claims as between the widow and the alienee would not be frequently pressed. But, as the state becomes more populous, and lands more valuable, this description of claims will be sought out and prosecuted. Although *I have been somewhat acquainted with the history of ju- [479 dicial proceedings in the state since 1806, I do not now recollect a single suit for dower against an alienee out of the county of Hamilton, except, perhaps, one in the county of Ross, before

the present case. There probably have been cases in the court of common pleas, which have not been removed into the Supreme Court. But in the county of Hamilton such cases have not been unfrequent.

Some of these cases will be referred to in the order in which they occurred. At the July term of the Supreme Court in Hamilton county, 1822, before Judges McLean and Burnet, Martha Ewing prosecuted four several writs of dower against John B. Ennes, John F. Keyes, George St. Clair, and Thomas Stanbery. The plaintiff claimed dower as the widow of Charles Conn. It appeared, from the pleadings in the case, that in the year 1801, the land in which dower was demanded had been aliened by Conn. The suit was commenced in 1818. The property was of that description which could not be divided, and the jury found the yearly value at the time of alienation, and also at the time of the commencement of the suit. It was decided by the court, that the widow should take her dower according to the value of the property at the time of alienation. These cases, I have been informed, were very fully argued, and carefully considered by the court, and this information was received from one of the judges who tried them, as well as from others who heard the arguments. It was in reference to one of these cases that Judge Burnet, in the case of McArthur *v.* Porter, 1 Ohio, 111, remarks: "In Ohio, it is admitted that the widow is dowable of lands mortgaged or aliened by the husband during coverture, if she do not join in the mortgage or deed of conveyance. *And it has been decided in the case of* Ewing *v.* Stanbery, *that she shall be endowed with reference to the value of the premises at the time of alienation.*"

At the June term of the same court in the same county, 1824, which was holden by Judges Burnet and Sherman, and myself, Elizabeth McCullough prosecuted three several writs of dower, against Henry Hathaway, John S. Wallace, and Abraham Ferris. It appeared that John McCullough, the husband of the demandant, died seized of the premises in 1803, and the court, in assigning dower, estimated the value of the property at that period. Whether the alienation in consequence of which the defendants 480] claimed title was made by the heir, or whether it *was made for the payment of debts subsequent to the death of McCullough, does not appear in the case.

If I am correct in the construction of the ordinance of 1787, in

the cases of Ewing *v.* Stanbery and others, the plaintiff was not entitled to dower at all. The land was aliened in 1801, at which time the only law in force in the territory allowing the widow dower was the ordinance, and under that she was entitled to dower in such lands only of which the husband was seized at the time of his death. Whether this point was agitated or not does not appear, but it does appear that the court fixed upon the time of alienation as the time at which the annual value of the land should be computed.

At the May term of the Supreme Court of Hamilton county, 1828, the case of Catharine Brown *v.* John T. Barr came on for hearing, and an interlocutory decree was entered. At the next term the case again came before the court, and a final decree was made. The term of 1828 was holden by Judges Burnet, Sherman, and myself, and that of 1829 by Judges Pease and Sherman.

This was a case in chancery. The complainant claimed dower as the widow of Daniel Brown, in a certain town lot in the town of Cincinnati. It appeared that the lot had been mortgaged by Brown to one Hunt, in 1817, and finally sold to the Miami Exporting Company on April 28, 1821. The petition was filed in 1826, and defendant claimed title under the Miami Exporting Company. It was decreed by the court that the complainant was entitled to dower, and that she should be endowed according to the value of the lot on April 20, 1881, when aliened to the Miami Exporting Company,

Thus stood the law in Ohio until 1833, when the case of Dunseth *v.* The Bank of the United States was decided. 6 Ohio, 75.

But it is urged by the counsel that these decisions are not to be regarded. This is his language: "I admit that much respect is due to circuit decisions, when they have been long acted upon, and a uniform practice and understanding have grown up under them. This is not the case with these decisions. *The practice has been the other way;* and no argument against their notoriety can be stronger than the fact, that the Dunseth case arose in the county of Hamilton, and no notice is taken of these cases, except in reference to what is said to have been held in *one* of *them. The court and the bar seem alike to have forgotten [481 them."

I am aware that decisions upon the circuit are not as well and as generally known as decisions made by the court in bank and

reported. But I suppose a decision made upon the circuit, if made by a full court and after mature deliberation, is just as binding upon the court itself, and just as good evidence of the law as if made by the court in bank. Neither a decision made upon the circuit nor in bank is such conclusive evidence of the law that it can not be reversed or overruled; and I trust that this court will never hesitate, when convinced that it has been in error, to retrace its steps. It is said that "the practice has been the other way" from that which was established in the cases cited. But where is the evidence of this? No case is cited in which a contrary practice has prevailed.

It is nothing remarkable that no notice should have been taken of these cases by the court in deciding the Dunseth case, when it is recollected that that case was not argued, and when it is further recollected that in 1833 there was not one of the judges who assisted in deciding those cases who was a member of the court. When the Dunseth case was reserved I was a member of the court, but not when it was decided. It was continued one term for argument, but through neglect of counsel was never argued. Why it was not I can not say, unless the counsel employed supposed that the law was settled by the decisions in the county where the case originated.

Having thus shown, as it seems to me, conclusively, that by the common law, by the decisions of the courts in the other states of this Union, and by the decisions of the highest judicial tribunal in this state, previous to the Dunseth case, the rule established was, that if the husband sold the land the widow should be endowed according to the value at the time of the alienation, I will now proceed to consider the principle sought to be established by the claimant in this case. That principle is this: In assigning to the widow her dower, the increased value of the land, in consequence of improvements made upon the land itself by the alienee, shall be excluded from the computation, but increased value from other causes shall be included. In other words, a widow shall not be endowed according to the value at the time of the alienation, but according to the value at the time of assignment, deducting from this valuation, however, the value of the improvements made by the alienee.

482] *It is not pretended that there is any decided case in England or in any state court in the Union, except in the Supreme

Court of Pennsylvania, which goes directly to sustain this rule. It is admitted that the cases already cited from New York and Virginia are directly against it. But it is said that the courts of New York are governed by a statute, and that the decision in Virginia was only by a majority of the court. So far as respects the statute of New York, we have already seen that it is a mere affirmance of the common law rule. The force of the decisions in England and the other states is evaded by the assertion, that in those cases the question of "increased value from extrinsic causes" was never considered by the courts. Chief Justice Thompson, in the case of Dorchester *v.* Coventry, 11 Johns. 510, insists that there is no difference between improvements made by the alienee and increased value from other causes. He says, "the same principle applies to both." And if there be any difference, if this question of increased value from extrinsic causes is so very important, is it not a little surprising that nothing should have been said about it in England during the more than six hundred years since the rule in that country was established, nor within these United States until within some twenty or twenty-five years past? In truth, the question does not appear to have been made in any decided case, so far as we are informed, until made in 1819, in the case of Thompson *v.* Morrow, 5 Serg. & Rawle, 289. Previous to that time the uniform and universal rule, so far as we know, was that the widow should be endowed according to the value *at the time of alienation.* And this from necessity excluded *all* increased value, no matter from what cause.

It is argued, however, that abstract justice requires the adoption of this modification of the old rule for the assignment of dower. This is unquestionably an important consideration. Whenever a rule of law is found to operate unjustly it ought to be changed, either by legislative enactment or judicial decision, and the former mode is far preferable.

But whether such change of this rule would be conducive to the ends of justice is, perhaps, somewhat problematical. In some cases it might have this effect; in others, however, it would be quite the reverse. Take a case where an individual, against the wishes of his wife, had disposed of his property at the instigation of the alienee, and where it was done with a view to deprive her of her rights, it would seem to be just that upon the *death of her husband, she should be endowed according to [483

the increased value of the land. But in ordinary cases, where husband and wife are one in feeling, and one in interest, as they are one in law, and where lands are in good faith sold for the benefit of the family, there is no justice, there can be none, in giving the wife, if she survives her husband, the benefit of the increased value of the land. Take the case, which is very common, where the husband, with the avails of one tract of land, purchases another, and after improving it, dies—where is the justice in allowing his widow the benefit of the increased value of both these tracts of land? Take another case, where the husband sells land and vests the avails in personal goods, chattels, and merchandise, and with these makes gain and dies. The widow is entitled to one-third of this personal property, to the use of one-third of the land with which it was procured, and will it be said it is just, that in addition she should be entitled to the benefit of the increased value of the land?

But there can hardly be a stronger case than the one under consideration to test the justice of the rule contended for. At the time this land was aliened, it was in a wilderness, and was of but little value. But through the energy and enterprise of the alienee, and those to whom he sold, this wilderness has become a cultivated country. In consequence of improvements made, and of extrinsic causes, the land has become immensely valuable. A town has been laid out, and in that town the seat of government for the state has been located. As a consequence of the location of the seat of government, the National road has been established in the neighborhood, and a navigable feeder to the Ohio canal constructed. All these things have a tendency to increase the value of the land. But to what extent each one severally has this tendency, it is beyond the power of man to tell. Now the question is, who in justice ought to receive the benefit of this increased value. The proprietors of the land, through whose agency, so far as individual agency is concerned, this state of things has been produced, or who have paid a high price as the value of the land has increased, or should it be divided between them and this widow. What has she done to enhance the value of this land? What have the heirs of her husband done? She has lain by for about thirty years, silent as the grave, while this property has been passing from hand to hand, each individual paying for it its full value, and she now comes into this court to enforce this claim, which Chancellor Kent

says, "is a *severe dormant incumbrance* *upon the use and cir- [484
culation of real property." Can any one suppose that if this property had descended to the heirs of George W. Allen, the seat of government of this state would have been established where it now is? Or that the National road or Columbus feeder would have been located where they now are? Or would these things have taken place had this claimant prosecuted for her dower within a reasonable time after the death of her husband, and had the dower assigned her covered the lands in which she now seeks to recover? If not, why should she be placed in a better situation in consequence of the alienation by her husband, than she would have been, had he died in possession? Justice *may* require it, but it seems to me it must be justice of an extraordinary character. There is much good sense in a remark of Chief Justice Savage, in the case of Walker *v.* Schuyler, 10 Wend. 486, and it is peculiarly applicable to this case. "It is certainly reasonable that the enhanced value should inure to the benefit of those through whose labor and sufferings and expenditures the appreciation has been procured. If the property has been rendered more valuable by the general improvements of the country, the defendant and not the plaintiff has contributed to that general improvement."

While upon this part of the case, it may not be useless to attend for a moment to the character of the cases which are most frequently brought before the court for the purpose of obtaining dower, and here I have no reference to cases between the widow and heir, but to those between the widow and an alienee.

One class of those cases are such as have originated in the peculiar circumstances of the state. As has been already remarked, at an early period large tracts of land were held by individuals. This was the case with the Connecticut reserve, consisting of more than 3,000,000 of acres. There was also the Virginia military district, set apart for the officers and soldiers of the Virginia line on continental establishment. In addition to this, there was a large tract of country designed for the officers and soldiers of the revolutionary war generally, and for certain refugees from Canada. A very considerable portion of the lands in the Virginia military district, and in the United States military district, as well as all the lands in the Connecticut reserve, were purchased in by individuals, who thereby became large landholders. And they were purchased with precisely the same object with which a merchant

lays in his stock of merchandise, that is, to sell again and make
485] gain. These large proportions were not, *and many of them never have been residents of the state. They have contributed neither labor nor money for its improvement, nor to enhance the value of property. They have sold their lands to the actual settler, and he has made the improvements. He has contributed to enhance the value of property generally. They have effected their objects, they have sold their lands for gain, and in this way, some of them at least, have accumulated great wealth. But in executing deeds of conveyance, it was done in many instances without any relinquishment of the right of dower.

In such case, in order that justice may be done to a widow, is it necessary that a court, in assigning her dower, should take into consideration the increased value of the land, arising from all other causes, except the particular improvements made upon it by the alienee?

It may be supposed that there are but few instances in which cases of this kind can arise; but it will be found, upon examination, that there are hundreds of thousands, if not millions of acres of land in the state, in this situation, and subject to this "severe dormant incumbrance." In many instances, it is fair to presume that neither party knew that the wife should join in a deed in order that she might be barred of her dower. In others, it might have been supposed that as the widow, if endowed at all, must be endowed according to the rule of the common law, of course the dower would be of little consequence. This applies to deeds executed out of the state, for it will be found that in most of those executed within the state, and by our own citizens, there is a relinquishment of dower.

There is another class of cases, and these are probably the most numerous, that have or will come before the court; and this consists of cases where the wife has joined with the husband in the deed and intended to release her right of dower, but has failed on account of some technical informality. In such case, justice would require not only that the widow should not be endowed according to the increased value of the land, but that she should not be endowed at all.

From any view which I have been able to take of the subject, it seems to me counsel are mistaken in supposing that the

ends of justice would be subserved by a modification of the common law rule.

It is not upon the position that justice requires a modification of this rule that counsel alone rely. They insist that it is already modified by judicial decisions, and that the settled rule *of [486 law upon the subject is that which they advocate. The authorities which they rely upon are a "*dictum*" of Chief Justice Parsons, in the case of Gore *v.* Brasier, 3 Mass. 544; Thompson *v.* Morrow, 5 Serg. & Rawle. 289; Pond et ux. *v.* Morrison and B. M. Co., 3 Mason, 347; 4 Kent's Com. 67; Dunseth *v.* Bank of United States, 6 Ohio, 76.

I have carefully examined all these authorities, and there can be no question but that the three decided cases fully sustain the counsel for the claimant.

As to the case of Dunseth *v.* Bank of the United States, I have already said that it seemed to me proper that in the investigation of this case, it should be taken into consideration, because that case is now depending upon a bill of review; and on this account it can not be considered as authority for the purposes of this case, with any more propriety than could the original case, which, by the present bill, is sought to be reviewed.

The case of Thompson *v.* Morrow, 5 Serg. & Rawle, 289, was decided in 1819. There can be no doubt of the ability and integrity of the court by which the case was decided. But from an examination of the opinion of Chief Justice Tilghman, it would seem to me that he was laboring rather to sustain a preconceived opinion than to ascertain, from an examination of authorities, what the rule had been held to be. Indeed, he says, that himself and his associates, Yates and Brackenridge, had entertained the opinion, that a widow was to be endowed according to the increased value of the land, excluding from the computation the improvements made by alienee. He says that he has looked into the year books and does not find anything to *contradict* this opinion. He admits the rule of the common law, but supposes the question of increased value from extrinsic causes had been overlooked, or not considered, and therefore concludes that this might be taken into the computation without impairing that rule. He cites no authority as directly in point to sustain his opinion, except the *dictum* of Ch. J. Parsons. He seems to consider this as having all the force of an adjudged case, and says, that he is not aware that

it has ever been overruled in Massachusetts. He admits that the authorities in New York are apparently against him, but supposes this may have been because there is a statute in New York, and by possibility this statute may have had some influence. In conclusion, he says, "Having considered all the authorities which 487] bear upon this question, *I find myself at liberty* to decide *according to what appears to me to be the reason and justice of the case; which is, that the widow shall take no advantage of improvements of any kind, made by the purchaser, but throwing these out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her." This very mode of expression shows that the judge understood that he was making some innovation upon the rule, as previously understood. It seemed to him to be reasonable and proper, and finding no case wherein it had been expressly held that the widow should not have the benefit of the increased value of the land from extrinsic causes, he was inclined to give it to her. And this, I believe, is the first case in England or America in which it has been so adjudged. The authority, and only authority quoted, as before remarked, is the *dictum* of Ch. J. Parsons, in Gore *v.* Brasier.

Judge Story, in the case of Powell and wife *v.* The Morrison and B. M Co., 3 Mason, 347, takes much the same view of the subject as Judge Tilghman, and comes to the same conclusion. He does not, however, place the same reliance upon the *dictum* of Ch. J. Parsons, as an authority, but admits, that there is great uncertainty as to what was the opinion of that eminent jurist upon this particular point. The only decided case cited by Justice Story, as being in point to sustain his decision, is the case of Thompson *v.* Morrow. He bases himself, not upon decided cases, but, like Judge Tilghman, upon the assumption, "that in none of the cases has the question in relation to the advance of land, independent of the improvements by the alienee, ever come up." An extraordinary assumption, it would seem to me, when we take into consideration the fact that dower was a favorite of the law, the length of time since the common law rule was established, and the character of the courts before which it has passed in review.

These are the only two decided cases favoring this view of the subject, taken by the counsel for the claimant in the case before this court, previous to the case of Dunseth *v.* Bank of the United

States. I say they are the only decided cases, because I know the counsel too well to believe that a single case favoring their views would be overlooked. True, the counsel cite a case from 1 Bland's Ch., in Maryland, but that was a case between the widow and heirs, and of course has no application to the case before this court. It is said, too, in Kentucky there *was a case decided in 1833, [488 which goes measurably to sustain the new rule, but that case does not seem to be much relied on.

So far as direct authority is concerned, the case of Powell et ux. v. M. and B. Manufacturing Company is based upon the case of Thompson v. Morrow, and this latter case is based upon the supposed opinion of Ch. J. Parsons. This "*dictum*" of Ch. J. Parsons, which is thus used, and is made the foundation for the charge of an ancient and well-known rule of the common law, and of many of the states of the Union, is found in the case of Gore v. Brasier, 3 Mass. 529. The case is a long one, and this *dictum* is found at page 544,

This was not an action of dower, nor had it connection with such an action, except by analogy. It was an action of *covenant broken*, upon a deed containing the general covenants. The first count in the declaration alleged a breach of all the covenants—the second, the breach of the covenants of warranty, and against incumbrances. The value of the land at the time of conveyance to Gore, was $9,000; at the time of his eviction, $15,000. Many questions were involved in the case, but the particular question under consideration when the dictum was uttered, was with respect to the rule of damages for a breach of the covenant of warranty. After a full consideration of the whole subject, the chief justice says, at page 546: "The court are of opinion, conformably to the principles of law, applied to *personal actions* of covenant broken, to the ancient usage of the state, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in this action ought to recover in damages the value of the estate at the time of eviction." Consequently the defendant was compelled to pay $15,000 damages, when in fact he received but $9,000 for the land. This decision was based, however, not upon the common law rules applicable to this class of action, but "upon the ancient usage of the state," and previous decisions of the same court, "supported by the practice of the legislature."

In commenting upon the case, he says, "By the ancient com-

mon law, the remedy on a warranty was by a voucher or *warrantia charter*, and the recompense recovered in those suits was other lands to the value at the time the warranty was made. This was the general rule; but when the warrantor, on being vouched, entered into the warranty *generally*, he was bound to render other 489] lands to the value of the lands lost *at the time* he *entered into the warranty. In valuing the land lost, when the voucher entered into the warranty specially, no regard was had to any improvements made by the tenant, as by erecting edifices, or turning pasture into arable land, *nor was the discovery of a mine in the land lost*, after the warranty, but then not known, considered in ascertaining the value of the land to be recovered in recompense.

"An effect originating in this feudal principle may be discovered in this state, in the assignment of dower against a purchaser. When the husband aliens with warranty during the coverture, and afterward dies, his widow shall not be entitled to the benefits of the improvements made by the purchaser, because he could not recover their value in other lands against the heir on the warranty of the husband. This rule is now supported in this state on principles of public policy, that purchasers may not be discouraged from improving their lands."

Here the common law rule for the assignment of dower is given, and the reason for that rule, and that is because the purchaser, or alienee, could not recover the increased value against the heir, but must be confined to the value at the time of alienation. But although the reason for the rule had ceased in Massachusetts, inasmuch as it was there holden that in case of eviction the warrantee could recover against the warrantor the value of the land at the time of eviction, still, it is said this rule is now supported in this state on principles of public policy.

And here let me ask, if public policy in Massachusetts requires that the common law rule for the assignment of dower should be sustained, "that purchasers may not be discouraged from improving their lands," although the reason for the rule in that state has ceased, does not public policy in Ohio equally require that it should be sustained here? Is there not the same necessity here that purchasers should be encouraged to improve their lands? Was there not a ten-fold greater necessity for it at the time the right of dower in the case before the court was consummated? But in Ohio the reason for the rule remains in full force.

In an action of covenant for breach of the covenant of warranty, this court has uniformly held that the recovery must be limited to the value of the land at the time the warranty was made, or, in other words, to the consideration money and interest. No matter what may be the increased value, no matter what may be the causes of that increased value, this is the extent of the recovery. Such is the settled law of Ohio.

*In the case of King *v.* Kerr's Adm'rs, where the subject [490 is treated of, it is said by the court, "in this state, where real property is rising fast in value, the value on eviction would be ruinous to the warrantor." 5 Ohio, 154. I would ask if such a rule would be ruinous to the warrantor, will not that rule be equally ruinous to the warrantee which permits a widow to take from him one-third of the increased value of the land in way of dower, and prohibits him from recovering the same ever against the heir of the warrantor? The action is not always against the immediate alienee of the warrantor, but frequently against a subsequent purchaser, and one who has paid a full price for the land, according to its increased value. In Massachusetts, the widow can recover dower only according to the value of the land at the time of alienation, although if she recovered according to the increased value, the alienee might recover over against the heir to the same extent; but in Ohio, it is contended that she may recover according to the increased value, although the alienee can recover over against the heir only according to the value at the time the warranty was made, or at the time of alienation.

But to return to the case of Gore *v.* Brasier. After having stated that the common law rule was supported in Massachusetts on principles of public policy, the judge proceeds: "If the lands have greatly risen in value, *not from any improvements made upon them, nor from the discovery of any new source of profit*, but from extrinsic causes, as the increase of commerce or population, it *may be a question* whether upon the *extendi ad valentiam*, the lands to be recovered in recompense would be valued at the increased price, so that the quantity might be proportionably reduced. This is but a question of mere curiosity, unless it should be considered as relating to the lands to be assigned to the widow for her dower. If the husband during the coverture had aliened a real estate in a commercial town, and *at his death* the rents have trebled from various causes, unconnected with any improvements

of the estate, and the widow should *then* sue for her dower, *perhaps* it would be difficult for the purchaser to maintain that one-ninth part only, and not one-third part should be assigned to her." This is the "*dictum*" of Chief Justice Parsons, about which so much is said, upon which so much reliance is had, and upon which the new rule established in the case of Thompson *v.* Morrow is based.

The case supposed is simply this: the husband aliens land, and the purchaser makes no improvement. The land remains in 491] **statu quo* until the death of the husband, at which time, owing to increase of commerce or population, the land has trebled in value; in such case a doubt is suggested whether the widow might not have assigned to her one-third of the land. The particular case put is of the sale of a lot in a commercial town. What is the similarity of such a case to the case of Thompson *v.* Morrow? In this latter case, the lot did not remain in the same situation as when sold, but the purchaser had made improvements. But there is still less analogy between this hypothetical case and the case before the court. In the case before the court, the sale was not of a lot in a commercial town, but of a large tract of wild or unimproved land in a wilderness, and, if there were any analogy to carry it out, the land should have continued, in a wild and uncultivated state, not only at the time of the death of the husband, but up to the present time, when the dower is claimed.

Can it be believed that Judge Parsons had in his mind a case like the one before the court? Justice Story doubts whether he had in view a case like that of Powell et ux. *v.* M. and B. Manufacturing Company, much less can it be believed he had in view a case like this. But even in the hypothetical case put, the chief justice expresses no opinion. He speaks doubtingly, "*perhaps* it would be difficult," etc. Judge Tilghman, however, considers this as evidence of the law in Massachusetts, and says, he is not aware that it has been overruled in that state. Yet in the case of Catlin *v.* Ware, 9 Mass. 218, which was a case in dower, and decided five years after the case of Gore *v.* Brasier, the Supreme Court of Massachusetts, Parsons being on the bench, held that the widow should be endowed according to the value at the time of alienation, and nothing is said about increased value.

The opinion of Chancellor Kent is referred to by the counsel for

the claimant as going to sustain the principle which they advocate. But, before examining the opinion of the chancellor, it may not be out of the way, as the only decided cases, quoted to sustain this new rule, are from Pennsylvania and Massachusetts, to remark, that was this case depending in the courts of either of those states, the widow not only would not recover her dower according to the increased value of the land, but she would not recover dower at all. She could not recover in Massachusetts, because these lands were wild when sold by her husband. 15 Mass. 164; 1 Pick. 21; 7 Pick. 143. She could not recover *in Pennsyl- [492
vania, because the lands were sold by a judicial sale. 2 Dallas, 127.

I have already referred to the opinions of Chancellor Kent, while he was judge of the Supreme Court of New York, and while he was chancellor of the same state, and have quoted his exact language, knowing it to be stronger and more appropriate than any I could urge in favor of the opinion which I entertain upon this subject. In the case of Hale *v.* James, 6 Johns. Ch. 258, which was decided long after the cases of Gore *v.* Brasier, and Thompson *v.* Morrow, after stating the rule of the common law, he says, that to take the value of the land at the time of the death of the husband, excluding improvements made by the alienee, would, in this country, be more favorable to the widow, because lands are generally increasing in value, and intimates that this rule might be adopted, "if we had it in our power *to dislocate the rule of computation*, and transfer it from the time of alienation to the death of the husband." This language strongly implies that it could not be done except by a breach or violation of law.

In his Commentaries (vol. iv, 66), after stating the rule of the common law in the assignment of dower, he says, "This is the doctrine of the American cases, and they are in conformity with the general principles of the English law, as to the time from which the value of the dower is to be computed, both as it respects the alienee of the husband and the heir."

On page 68 of the same volume, is found the expression which is relied upon as sustaining the new rule. After referring to the cases of Gore *v.* Brasier, Thompson *v.* Morrow, Powell and wife *v.* M. and B. Manufacturing Company, the chancellor says: "The better and more reasonable general American doctrine upon this subject, I apprehend to be that the improved value of the land,

from which the widow is to be excluded, in the assignment of her dower even as against a purchaser, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes.

I do not know that I rightly understand what the chancellor means by the "*better and more reasonable*" doctrine. If by it he mean that the doctrine by him here stated is "*better and more reasonable*," because more consistent with abstract justice, this is a matter about which there will be a great difference of opinion, and individuals would be influenced in a great measure by 493] *preconceived notions upon the subject of dower. For one, I am free to confess, that in the present state of society, and in ordinary cases, I can see but little abstract justice in allowing a widow, whose husband has sold land and applied the avails of it to her benefit and to the benefit of the family, to come in and claim from the purchaser, who has paid the full value of the land, the use of one-third of it during her natural life. But there is justice, where her husband dies seized of land, that she should have the use of one-third of it for her support and maintenance. In the latter case, she receives her support from the avails of the labor and industry of herself and husband; in the former, from the avails of the industry of a stranger.

If the chancellor, by "better and more reasonable," means that this new doctrine is better sustained by authority, I think he is mistaken. In favor of it are two and only two cases—one decided in Pennsylvania, and the other in the Circuit Court of the United States for the district of Massachusetts. Against it are his own decisions while judge of the Supreme Court in the State of New York, and while chancellor of that state; numerous decisions in the same Supreme Court since he ceased to be a member of it; decisions in the Supreme Court of Massachusetts, and in the highest judicial tribunals in New Hampshire, New Jersey, South Carolina, Virginia, Kentucky, and Indiana, to say nothing of the cases decided in this court as before referred to. Should it be said, that in most of these cases the precise question, as to taking into computation in assigning dower, the increased value of the land arising from extrinsic causes was not taken into consideration, I can only reply that, in three cases in New York and one in Virginia, it was the point principally agitated.

From the careful examination which I have given this subject,

and I have endeavored to give it the most careful attention, it does seem to me, that upon principle as well as upon authority, the rule of law is well settled, that when a widow claims dower in lands which have been aliened by her husband she shall be endowed according to the value of the land at the time of the alienation. My brethren differ from me, and therefore I ought to distrust my own opinion; but, after the most anxious reflection, I can not see it to be otherwise. It seems to me, further, that this rule is in conformity with justice and reason, and peculiarly applicable and appropriate to a new state like Ohio. And I am fearful that the change or modification of it will be followed, in many instances, by ruinous consequences. As the decree, in the case sought to be *reviewed, directed the dower to be assigned according to [494 the present increased value of the lot in question, excluding improvements made by the purchaser, I think it was erroneous and should be reversed.

JONATHAN A. CRAM *v.* DAVID D. SPEAR.

It is not admissible for a plaintiff to prove books of entries of money, but, in large sums, by his own oath.

RESERVED in the county of Muskingum.

The declaration in this case is in *assumpsit*, containing the common count.

Plea, general issue, with notice of set-off.

At the last term of the Supreme Court, in the county of Muskingum, a jury was sworn to try the issue.

On the trial the plaintiff produced a book purporting to be a book of accounts, having the first six and one-half pages written upon, consisting of such entries as are usually made in book accounts; the dates extending from September 4, 1834, to July 23, 1836. On page 6, the following successive entries are made

1836. Jan. 15.	D. D. Spear, *Dr.*		
	To cash lent, ...	$400	00
" " 18.	D. D. Spear, *Dr.*		
	To cash lent, ...	275	00
" Feb. 14.	D. D. Spear, *Dr.*		
	To one horse, sold Tallmage, .	70	00
		501	

And on page 7, the following:

ZANESVILLE, *March* 19, 1836.

D. D. Spear, *Dr.*

To draft on New York, by Mr. Stewart, . $45 00

May 15. D. D. Spear, *Dr.*

Paid ¾ per cent. discount and premium on a bill at Zanesville Bank, for $1,000, for 4 months, 30 00

Balance for mare traded for Bob Hoxse, as per contract, foundry, ... 40 00

To cash in store, ... 12 50

Then follow three other charges against different individuals, and the residue of the book is blank.

The plaintiff then offered himself as a witness to prove the said several charges of cash contained in said book. The witness 495] *was objected to as incompetent, by the counsel for the defendant, and the objection sustained by the court. Whereupon the plaintiff suffered a nonsuit.

At a subsequent period of the term, the plaintiff moved to set aside the nonsuit, and for a new trial, on the ground that the court mistook the law in rejecting the evidence offered by the plaintiff.

GODDARD and CONVERSE, for plaintiff.

JAMES, STANBERY and VAN TRUMP, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The decision of this motion depends upon the construction of section 2 of the act of December 18, 1823, "dispensing with proof in certain cases." 2 Chase's Stat. 1295. This section provides, "that in all actions where any claim or defense is founded on book accounts of not more than eighteen months' standing, in which is drawn in question the validity or amount of any such book accounts, the court or justice may, upon the trial of such action, examine the party under oath or affirmation, touching the validity of such account or accounts, which shall be admitted as evidence on the trial, the credibility thereof being left to the jury or justice to determine." It will be remembered that this is not the first statutory provision in this state upon the subject. Section 6 of the "act for the prevention of frauds and perjuries," passed February 19, 1810, is in words the same. 1 Chase's Stat. 695. I well recollect that the courts of that day, when this enactment

was first made, held that it only authorized the party to testify that the book introduced was his book of accounts, and that he could not by his own oath verify any particular item of charge. This construction was adopted on the ground that the statutory provision was an innovation upon the principles of the common law, and ought not to be extended beyond its letter, and from an apprehension that a statute made for the *prevention* of frauds and perjuries, would, by any other construction, have a tendency to *increase* perjuries.

This strict construction was not, however, adhered to for any length of time, and in the course of practice upon the circuit, the following general principles have obtained:

1. If the items charged are such as generally constitute the *subject of book account, the quantity, quality, and delivery [496 of the articles, if goods or chattels, or the services performed, if labor, may be proved by the oath of the party claiming by virtue of the book account. But the book in which the original entries were made must be produced, otherwise the oath of the party will be rejected. If, for instance, there be day-book and ledger, the day-book as well as the ledger must be before the court.

2. Money, especially if of any considerable amount, is not the proper subject of book account; still if, in the course of business, small sums are passing between the parties, these may with propriety be charged on book, and proved in the same manner as the other items of the account.

3. Although the party introducing the book can only testify to the quantity, quality, and delivery of the articles, or to the performance of the services therein charged, still in the cross-examination more extensive latitude of inquiry is given.

4. The party testifying, to sustain the charges on his book, can not testify as to the value of the articles charged, or of the labor performed; much less, if there be a specific contract, can he testify to such contract.

Books of deceased persons have sometimes been permitted to go to the jury, in connection with other evidence, and without further proof, as to the books themselves, than that they were in the handwriting of the person making the charges. But this has been done, not in consequence of the statute, but from the necessity of the case, and in accordance with the principle that the handwriting of a clerk in the habit of making charges may be proven

after his decease, or when he is without the jurisdiction of the court.

It is insisted, however, by counsel for the plaintiff, that this is an improper construction of the statute, and one which does not carry out the intention of the legislature. And the position is assumed, that any charges made upon book may be verified by the oath of the party making such charges. If, however, we apply the ordinary rules of construction to the statute, I apprehend it will be found that the practice adopted under it is substantially correct. In transactions among men, it is an ordinary custom to keep books, in which charges are made for goods and chattels sold, labor performed, or other services rendered. The merchant, the farmer, the mechanic, the professional man, all keep books of account. And in a great proportion of cases, it would be utterly impossible to prove the 497] *accuracy of the charges made on these books by disinterested testimony. In consequence of this difficulty, a practice has been prevalent in some of the states to permit parties to testify to their accounts, even where there is no statute to authorize it. Such is believed to be the case to some extent in New York, and to a greater extent in Pennsylvania. In Connecticut, they have a form of action denominated an action of *book debt*, and by a statute enacted as early as 1714, and which has been continued to the present time without any material change, the parties are authorized to testify as witnesses. 1 Swift's System of Con. 166. This statute, however, seems to have been the mere recognition of a principle previously adopted in practice. By a statute of Vermont, passed as is believed in 1797, actions upon book account are placed in some respects upon the same footing with the old action of account, and the parties may be examined upon oath.

The difficulty of making proof in such cases was undoubtedly the inducement which induced the legislature of Ohio to enact the provision before referred to in the acts of 1810 and 1823. In construing this provision, however, it will not do to extend it beyond the pre-existing mischief intended to be remedied. That mischief was the extreme difficulty, and in many cases, the utter impossibility of proving the quantity, quality, or delivery of articles passing from one person to another upon credit, and which are ordinarily charged upon book. The merchant does not always keep a clerk by whom this proof could be made; the

farmer or mechanic rarely, if ever. Hence the necessity of the statute. But when the quantity, quality, and delivery are proven by the party who alone may be supposed to be acquainted with these facts, there is no necessity of going any further with the testimony from this interested source. The price or value can as well be proven by disinterested witnesses.

It could not have been the intention of the legislature to make any change in the business of the country, or to authorize charges to be made upon book for things which are not properly the subject of book accounts; and if any person shall make such charges upon his book, with a view to sustain them by his own oath, it can be viewed in no other light than as an attempted fraud upon the law. Money lent or paid is not ordinarily charged upon book. The person lending or paying usually takes a note or receipt. An individual, it is true, might be engaged in a business that would seem to justify such charges; and in such *case, I am not [498 prepared to say that he might not be examined as a witness. Whether he might or not, it is not now necessary to determine. The case before the court is not one of that character. Here an account was exhibited, consisting of seven separate items, amounting in the whole to $872.50. Of this amount $687.50 was contained in three separate charges for cash. It was proposed to prove this part of the account, and this alone, by the oath of the party. In the opinion of the court, it could not have been the intention of the legislature to admit this kind of testimony in such a case. And we believe that the construction heretofore given the statute upon the circuit is correct, and are not disposed to depart from it.

This opinion is fortified by the following authorities: 8 Johns. 211; 12 Johns. 462; 1 Yeates, 347; 1 Day, 104.

The motion is overruled, and judgment will be entered for the defendant on the nonsuit.

JOHN CAMPBELL ET AL. v. ALEXANDER WATSON ET AL.

A conveyance in trust may be canceled by a decree in equity, so as to bind the interests of all, though the cestuis qui trusts be not made defendants.

505

THIS is a suit in chancery reserved from the county of Delaware.

On August 23, 1816, Samuel P. Campbell, then seized of certain lands in Delaware county, conveyed them to Samuel Campbell, George Davis, and John Chambers, trustees, etc., to hold upon the following trusts, viz:

1. To himself for life.

2. Remainder to the heirs of his body and their right heirs forever.

3. Remainder to Robert Campbell for life.

4. Remainder to the heirs of his body, and their right heirs forever.

5. Remainder in fee, to the children of Samuel Campbell and Catharine Morton.

6. And with power in Samuel P. Campbell to charge and jointure of $5,000 upon these lands.

In 1826, Samuel P. Campbell filed his bill in Delaware common pleas, to set aside this deed of trust on account of fraud. The three trustees only were made defendants. In May, 1827, a final decree was passed, finding the fraud, annulling the deed, and di-
499] recting a reconveyance by the trustees. The deaths of *Samuel P. Campbell and Robert Campbell have occurred since the decree, both unmarried and without issue. This bill is filed by the children of Samuel Campbell and Catharine his wife, formerly Catharine Morton, disclosing the above facts, and demanding the remainder in fee, lastly created by the above deed of trust.

General demurrer by defendants.

WILCOX, for demurrant:

The proceedings in the former case have extinguished the plaintiff's interests.

The trustees and the first tenant in tail were parties to the decree. The rule is thus laid down in England:

"Where real property in question is subject to an entail, it is generally sufficient to make the first person in being, in whom an estate of inheritance is vested, a party with those claiming prior interests, omitting those who may claim in remainder or reversion after such vested estate of inheritance; and a decree against the person having that estate of inheritance will bind those in remainder or reversion." Mit. Pl. 174, 231.

Gifford v. Hart, 1 Sch. & Lef. 386, is a leading case and much in

point. A decree had been taken against the first tenant in tail, under which the lands had been sold by a master. Neither the trustees nor any person entitled in remainder were made parties. The court held the remainder-men bound. This is the language of the chancellor:

"It has been repeatedly determined, that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court *before he has issue*, the contingent remainder-men are barred; this is now considered the settled rule of courts of equity and of necessity."

The same rule is laid down in 2 Jac. & Walk. 133; 1 Atk. 590.

It seems to be a rule in England that a decree against a prior tenant in tail binding the lands entailed, can not be disturbed by a subsequent remainder-man, except on *appeal*, or by bill of *review*, The remainder-man seems to be regarded as privy in estate, and therefore, can not sustain an *original* bill. 1 Sch. & Lef. 386; Mit. Pl. 173, 230, 92, 137.

This bill, therefore, can not be sustained. The objection well *lies, because the complainants have themselves set forth [500 the decree in their bill.

W. A. ADAMS and H. STANBERY, for plaintiffs:

The principle that a judgment against the first tenant in tail binds the remainder does not apply. Even admitting this was a direct entailment, and Samuel P. Campbell the first donee in tail, he was not before the court as a party in the attitude to give the principle effect; he was not a party defendant representing or protecting interests in remainder. It was a suit between trustees and one of the *cestuis que trust; other cestuis que trust, not parties*, are not bound.

They cite Edwards on Parties in Chancery, 161, secs. 48–50; Hopkins *v.* Bear and Hopkins, 1 Atk. 590; Kirk *v.* Clark, Rec. Ch. 275; Calverly *v.* Phillips, 6 Mad. 229; 2 Chitty's Eq. Dig. 1313, tit. viii; Mit. Eq. Pl. 135, 139, 145, 146.

Judge LANE pronounced the opinion of the court:

As Samuel P. Campbell was unmarried at the execution of the deed of trust, the rights created under it consisted, if it took effect, in a legal estate, in fee to the trustees, and a vested equitable estate in Samuel P. Campbell, with successive contingent equitable

remainders to the heirs of his body, to Robert Campbell, and the heirs of his body, and to certain children of Samuel Campbell.

Equitable estates in land are subjected, in courts of equity, to the same rules which govern legal estates in courts of law. 2 Bl. Com. 337; 4 Kent's Com. 302. The plaintiff's estate created by this deed, being a contingent remainder, depended upon the trustees' legal fee, and upon the equitable freehold of Samuel P. Campbell, as a particular estate, and it was liable to be defeated by any act which should destroy these estates before the happening of the contingency. "Wherever there is an estate for life, and contingent estates depending on it, the tenant for life may not only by death, but by surrender, alienation, and other methods, determine his own estate before the remainder vests, the consequence of which is, he utterly defeats them all." 2 Bl. Com. 171. A feoffment with livery, in many cases, may work this effect, but the chief instrument is a recovery, whose great value, as a com-

501] mon assurance, arises from its power to defeat *remainders. The doctrine by which it operates is, that a recovery of a judgment in a real action against a tenant to the precipe seized of the freehold, besides him, all contingent estates depending on his estate, and all vested remainders where owners are made parties by aid prayer. 2 Bl. Com. 171, 362; Co. Lit. 362; 8 Ohio, 106.

A decree operates upon an estate in equity.

E. H. Flint and Micah P. Flint v. The Ohio Insurance Company.

Where there is a special understanding between an insurance office and the agent of the insured, that no insurance should be considered as effected on behalf of himself or others for whom he might act, until the premium was paid or secured, no treaty or agreement for insurance where this requisite is not performed or dispensed with, can be set up in equity to charge the office.

This case came from the county of Hamilton.

The bill alleges that the complainants were the owners of $7,000 worth of books, in the custody of William D. Jones, to be by him forwarded to complainants, at Alexandria, Louisiana.

That they directed Jones to have the goods insured.

That Jones, on November 10, 1834, by his clerk, called upon the officers of defendants, of which Jones was director, and made a written proposal to insure said goods, as follows:

"Insurance is wanted on twenty-one boxes and three stoves, shipped on board the steamboat Grenadier to Natchez, to be forwarded from thence to Alexandria, Louisiana. Amount to be insured, $4,200. Signed for E. H. Flint & Co., W. D. Jones."

The president replied, that they would take the risk at one and a half per cent. to Alexandria, which was agreed to, and a policy was actually made out, signed by the president of the company, and laid aside for said Jones. The policy was dated November 10, 1834, and by the terms thereof, insured plaintiff's goods against, etc., in ordinary form.

The contract was made and fully completed in equity, by the agreement of the parties, but not so as to enable plaintiffs to sustain an action at law; because the policy made out, signed, etc., by mistake, describes the property as belonging to E. H. Flint only. The goods were shipped on board, on November 10, 1834, to the value of $7,200.

The bill then avers the sailing of the boat, with the goods on board, on November 11th, and afterward avers a total *loss [502 by a peril of the river, in the same month; avers complainants made, and exhibited to the defendants, full proof of their property in the goods, of the loss thereof, and were ready, and offered to produce such further proof as defendants should reasonably require; but defendants refused to pay the sum insured, and refused to receive any further proof, or to acknowledge any liability, on account of said contract of insurance, or loss, pretending they were not liable, because they had not received payment of the premium.

The bill charges, that the company, at the time of entering into the contract, did not insist, nor were they uniformly in the habit of insisting, upon the immediate payment of the premium, but, on the contrary, defendants, and other insurance companies, were, and are, in the habit of taking the promissory notes of the insured and their agents, and are in the habit of giving credit to commission merchants and brokers for the amount due for premiums on insurances. William D. Jones was in the habit of dealing with the defendants on these terms, and did, in fact, give defendants

credit on his books for the amount of the premium, at the time of effecting the insurance.

No discovery is sought.

Prayer is, that defendants be decreed to pay the amount insured, or if that can not be done, that the defendants be decreed to deliver a policy according to the agreement.

The defendant filed an answer, although not called upon by the bill to do so.

The defendant requires proof of ownership and kind of property destroyed.

It is admitted that a proposition was made in the books, at their office in Cincinnati, by Samuel McCormick, in name of William D. Jones, for E. H. Flint & Co., November 11, 1834, in substance as stated in the bill.

That the effect of this proposition, according to the usage and custom of the office, as understood by Jones, is to inquire at what rate a risk would be taken.

To this proposition a memorandum was made on the answering book, signifying that the office would take the risk at one and a half per cent. premium; but they deny that Jones or McCormick ever assented or agreed to said answer, or accepted the insurance, or paid the premium, or agreed to pay it, until after information was received of the loss.

503] *They deny that they ever made insurance on the goods in any way, or on any terms.

It is admitted a policy was filled up in the office by a young man, not a clerk in the office, who occasionally assisted the secretary in writing, dated November 10, 1834, predicated upon said proposition and answers, and prepared to be ready for delivery in case it should be called for, and the premium paid. But said policy was not valid, nor intended to be any evidence of insurance made, until the premium should be paid, and the same delivered; and that the policy was not, in fact, delivered.

It is alleged that it is customary for policies to be made out, so that they may be ready when called for.

Defendants do not admit the goods were shipped, nor the loss of them; nor do they admit notice, nor that preliminary proof was furnished of the loss, nor that the premium was ever tendered.

They insist that they have a standing rule, and it has been the uniform usage, that risk should not be commenced until the policy

was delivered, or an acceptance written and signed on the answering book, and the premium actually paid, or satisfactorily secured, as complainant, and Jones and McCormick, at the time of making the proposition, well knew.

It was a special rule of the office, that no risk should be considered as taken, before a policy was delivered, until such written acceptance was entered on the answering book; a copy of this rule has been kept in the office, posted up, and risks are not considered as taken until the premium is paid, or written acceptance or policy delivered. That Jones has always acted on this rule, being always in the habit of writing an acceptance.

That in this case, no acceptance was made, either written or verbal, by Jones, or any other person.

That it is the general rule of the office, to require payment of the premium, or a note therefor, at the time insurance is made; but the secretary of the office has a private understanding with some confidential mercantile houses, that he shall keep an account, and call on them when he has occasion for it; but in these cases the same written acceptance, or the delivery of the policy, is uniformly required.

That such an understanding existed with Jones prior to 1822 when a dispute arose between Jones and defendant, and from that period an express understanding was had, that with Jones, *no risk would be considered as taken, on his application [504 for himself or others, until he had actually paid the premium, although a regular acceptance should be entered; and since then business has been so conducted with Jones, he always paying the premium at the time the contract of insurance was closed, and none being closed until such insurance was paid.

Proofs were taken in the case, which are sufficiently noticed in the opinion of the court. The result of these proofs constituted the material question to be decided.

STORER and FOX, for complainant.

WRIGHT and WALKER, and WRIGHT and HODGES, for defendant.

Judge GRIMKE delivered the opinion of the court:

This was a bill in chancery, filed for the purpose of perfecting an alleged agreement to insure. The premium was not paid; the policy, though made out, was never delivered; and it describes the goods as the property of E. H. Flint only.

There can be no doubt, that if an agreement has been made, which is binding upon the parties, a court of equity will decree a policy to be executed and delivered. And it is equally certain, that where it is proved that a policy has, by mistake, been reduced to writing in terms which are not conformable to the real intention of the parties, that the court will compel the policy to be rectified. This, which was once considered a doubtful proposition, has been completely settled since the case of Henkle *v.* Ray. Exc. Ins. Co., 1 Ves. sen. 317, and the principle has been illustrated and enforced, by repeated decisions in England and the United States. The view which we have taken of the case, however, will render it unnecessary to consider whether the facts disclosed will enable the court to grant relief on this ground.

It is proved to have been a rule in this office, not to consider the insurance effected until the premium was paid or the policy delivered, or until a written acceptance was entered on the answering books; and it is also stated in the evidence, that a copy of this rule was constantly kept posted up in the office. The legality of these special rules has been questioned; but I know of no principle which forbids underwriters from limiting and qualifying the general responsibility which would otherwise 505] *attach to them. The case has been likened to that of common carriers. But there is, in reality, the greatest imaginable difference between the two cases. A common carrier is under a common law obligation to carry goods; and the law has not therefore, given him a *general permission* to exempt himself from responsibility. But the rule, even with regard to them, is very different from what is supposed. The indulgence is afforded them, of qualifying their general liability by limitations not inconsistent with their common law obligation. Formerly a carrier might, where he had just ground for doing so, decline altogether to take goods; or, if he consented to accept them, he might protect himself by the special terms upon which he agreed to receive them. Bodenham *v.* Bennett, 4 Price, 34. And the receipt of goods, upon such conditions, was considered as a special acceptance, and was usually made in each particular case. But, in recent times, a mode has arisen of effecting the same object, by means of a general notice, intimating to the public the terms upon which the carrier consents to take goods. The legality of these notices, in the case of common carriers, and the policy of adopt-

ing them, have been frequently questioned, and their introduction has been regretted by many eminent and learned persons, 4 Camp. 41; 8 Taunt. 146; but they are now established to be legal, and are constantly received and acted upon in courts of justice.

In Nicholson *v.* Willan, 5 East, 507, an objection to their validity came formerly before the court, and Lord Ellenborough observed that "inasmuch as carriers were deemed fully competent to limit their own responsibility in all cases by special contract, and as there is no case in the books in which the right of a carrier thus to limit, by special contract, his own responsibility, has ever been, by express decision, denied, we can not do otherwise than sustain such right, however liable to abuse it may be."

Nothing is more common than to post up rules (as was done by these defendants) for the purpose of giving information to the public. It is said that the notice should be fixed in some conspicuous part, that persons delivering goods may have ample means of seeing the terms on which the business is conducted, 2 Camp. 415; 3 Camp. 28; and there does not appear to be any objection on this ground to the notice in this instance.

Admitting, therefore, as a general rule, that the agreement to insure is complete, although the premium has not been paid, yet that rule has been varied by the notice in this case, and by the *particular terms upon which the underwriters agreed to [506 insure. But I apprehend that no case can be found in the English books during the last fifty years, in which the premium has not been paid *by the insured*, and yet the contract considered complete, either at law or in equity. The actual state of the law in England absolutely forbids that this should be the case. By statute, the premium is required to be inserted in the policy, and the acknowledgment contained in the policy of the receipt of the premium by the insurer is conclusive as between him and the insured, except in a case of fraud. The case is not like a deed of conveyance, where, although the receipt of the consideration money is acknowledged in the deed, an action may be brought to recover it, if it has not been really paid. The cases which are found in the books, where actions have been brought to recover the premium, are never against the insured, but against the broker. As between the underwriters and the insured, the acknowledgment in the policy stands in the place of the actual payment of the money, and is conclusive evidence of that fact. The former

are, in the absence of any fraud, precluded from recovering it against the insured. 1 Camp. 532.

It is, I imagine, in consequence of this state of the law, in Great Britain, that the insurance offices in the United States have generally adopted the practice of framing particular rules, for the conduct of their business, and as a guide to those who transact business with them. The policies in the United States are framed after the model of those in England; they generally acknowledge the receipt of the premium, although we have no statute like the British requiring such a clause to be inserted, and drawing after it the consequences which I have mentioned.

The case of Perkins *v.* Wash. Ins. Co., 4 Com. 645, has been referred to by the complainant's counsel; and yet it is impossible not to see that it is very strong authority on behalf of the defendants. For although the letters from the underwriters in New York to their agent in Georgia express that the policy should take effect from the time the premium is paid *and received at New York*, yet the company, in their answer, admit that they sent printed proposals to him at Savannah, in which the words "and received at New York," were left out. These proposals were actually hung up in the office, and the premium had been paid to the agent, who was *quoad hoc*, the insurer; and it was very naturally decided that these proposals should govern the contract. The agreement 507] to insure was considered complete *in equity, because the premium had been received in compliance with the proposals, and there appears to have been no question of the right of the company or their agent to frame particular rules for the conduct of their business.

It was, then, a rule in this office not to consider the insurance effected, until the premium was paid, or the policy delivered, or until a written acceptance was entered on the books; and not one of these conditions has been complied with.

But there are other circumstances which show that the complainants are not entitled to relief. The deposition of McCormick proves that in consequence of a previous misunderstanding between Jones (the agent) and the company, the former was particularly notified that no insurance should be considered as effected, whether he acted for himself or on behalf of others, until the premium was actually paid.

The complainants have not complied with the general rules of

the office, nor with the particular agreement between their agent and the defendants; the contract to insure was not completed in equity, and the complainants are not entitled to relief.

JOHN G. REMINGTON *v.* BENJAMIN HARRINGTON.

In motions for a new trial, points not stated in the motion are not open for discussion in the court in bank.

Where notice to an indorser is the question in issue, the facts of the res gestæ may properly be given in evidence, though no one proves the actual fact of notice, separate from its connection with others.

Where a variety of facts are given in evidence, tending to prove notice to charge an indorser, the court should not set aside the verdict upon mere difference of opinion with the jury.

THIS case was submitted to the jury, on the last circuit, in the county of Cuyahoga, and reserved for decision in this court, on a motion filed by the defendant's counsel for a new trial. The action was founded on a negotiable note for the sum of $800, payable six months after date, to the order of the defendant, at the Bank of Cleveland, signed by Luke Ripley, and by the defendant *indorsed* to the plaintiff. The defendant plead the general issue, and gave notice of set off in the usual form.

On the trial, the plaintiff, after having given the note in evidence to the jury, offered other proof, which was objected to by the defendant's counsel, but admitted by the court, and which was as follows: T. C. Severance testified that he was, at the time, teller in the Bank of Cleveland, and that the note was left at the bank for collection, before it became due. That, on the last day of grace, it was protested for non-payment, and a written notice thereof made out by the witness and deposited in the post-office of the city of Cleveland, between the hours of four and *six [508 o'clock, in the afternoon of the same day. That the defendant resided at the time in said city, and was the keeper of a public house, midway between the bank and the post-office; that the bank, public house, and post-office were on the same street, and on the same side of the street; but the witness did not know

whether or not the defendant was at home, when he left the notice at the post-office.

John Tomlinson, a clerk in the post-office, testified that the defendant rented a box in the post-office, in which were placed, by his direction, all letters and papers which came to the office, directed to the defendant, and other members of his family; and that the contents of the box were called for *daily, or more frequently*, by the defendant in person, his barkeepers, servants, or by one Sartwell, a stage agent, boarding with the defendant; and it was admitted on the trial, by counsel, that all the letters and papers of the defendant, or members of his family, taken from the office by Sartwell, were delivered by him to the defendant, or to some one of his barkeepers. It was further admitted, on the trial, that there was, at the time, no penny-post, who distributed letters through the city of Cleveland.

Luke Ripley, the maker of the note, testified that after the note became due, it was his impression the defendant called on him and requested him to have the note paid.

On this evidence, the jury found a verdict for the plaintiff, and the defendant's counsel submitted a motion for a new trial for the reasons as they appear on record:

1. That the verdict is without evidence.
2. That it is against the evidence; and,
3. That it is against the law.

PAYNE, WILSON, and SPAULDING, for the motion.

J. C. WRIGHT and S. J. ANDREWS, against the motion.

Judge WOOD delivered the opinion of the court, as follows:

Two questions arise in this case for decision: 1. Was the testimony offered by the plaintiff, objected to by the defendant, and admitted by the court, proper for the consideration of the jury? 2. Was that evidence sufficient to warrant the jury in finding for the plaintiff? The first point is not embraced in the motion, and to the points there made, the discussions of counsel 509] *should, in ordinary cases, be confined, because they are the only notice to the opposite party of the questions to be raised, and constitute the substratum on which the opinion of the court rests. The objection was made at the trial, and is relied upon in the argument here, that the court erred in the admission of the evidence; and counsel have probably supposed that point was

embraced in their motion, or that it followed, as a corollary, the reasons on file. Such, however, is by no means the fact. But if it were otherwise, the result, in this case, would be the same. Where the issue is that of due diligence, on the part of the holder of negotiable paper, to enable him to recover of the indorser, there is no exception to the general rule, that all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute." 1 Stark. Ev. 40. It is no legal objection to the competency of the evidence, that it does not prove the entire issue or is insufficient to warrant a recovery. However inadequate it may be for this purpose, if it tend to demonstrate or make clear the point in controversy, it is competent and must go to the jury.

Baldwin *v.* State of Ohio, 6 Ohio, 16. The point in dispute was that of notice to the indorser; and it can, we think, hardly be questioned that the proof admitted bore directly on that inquiry and should not have been withheld.

Does the evidence warrant the finding of the jury? This must depend on the fact: 1. Whether due diligence was used to obtain the money of the maker; and, 2. Whether legal notice of its non-payment was given to the defendant as the indorser. It can not, we think, be successfully controverted that the leaving of a note at the place of payment, for collection, is a sufficient demand on the maker. Conn *v.* Gano, Ohio C. 210. Indeed, the right of the plaintiff to recover does not depend upon his making a demand, for a demand need not be averred in the declaration nor proved on the trial. Id. 210, 211. But the sufficiency of the notice to the indorser is very zealously and ably contested. The argument is that the undertaking of the indorser is conditional, and depends on his receiving strict notice of the non-payment of the note by the maker. It is said the time and mode of this notice has been defined with great clearness and precision. That if the indorser resides in another town, notice may be sent by the next day's post; that when the parties live in the same town, and *within [510 the circuit of the penny-post, it is sufficient to give notice through the post-office, by letter. But if there be no penny-post, it is said the notice must be personal or by a special messenger. There can be no doubt that the positions assumed are sustained by a

great weight of authority, and may be considered as the well-settled law of this state and others of the confederacy. *But if personal notice were given in this case*, the law is satisfied and the argument has no application. There is no positive proof of personal notice, but circumstances have been resorted to; they have been spread before the jury, and, from the facts surrounding the transaction, they have presumed personal notice; and we are now called upon to revise this evidence, and to determine, from it, whether the weight of it is with or opposed to the finding of the jury upon this point.

The defendant lived near the post-office; he rented a box; his letters and papers were put into it. This notice, directed to the defendant, was deposited in his box between four and six o'clock in the afternoon of the last day of grace on the note, and after its protest. The defendant called at the office *once a day or more frequently*, for his letters, and if sent by Sartwell they were delivered to his barkeepers or himself. Can this evidence be otherwise than satisfactory that the defendant received personal notice, or that notice was left at his house, in the hands of his agents, on the *day* of the protest, or on the *succeeding day?*

It may be supposed that notice on the day after the protest is not in time, as the parties resided in the same town. It was so decided in Woodbright *v.* Brigham, 12 Mass. 403, where the court held that notice in such case should be given to the indorser on the same day on which there was a demand and refusal of payment. But in Langdale *v.* Trimmer, 15 East, 291, and in Bennett *v.* Raugh, 2 Taunt. 87, a notice on the day after the demand and refusal was held to be in time; and in Derbyshire *v.* Parker, 6 East, 3, Mr. Justice Lawrence said that the general rule, collected from all the authorities, with respect to persons living in the same town, seemed to be that the notice should be given by the next day; and to such as live in different places, that it should be sent by the next post. Such is, also, the import of the decision in Carp *v.* McComb, 1 Johns. Cas. 329. It is there said, without distinction as to the residence of the parties, that although the notice of non-payment may be given on the day of the demand, it is earlier than is required.

In the Hartford Bank *v.* Stedman, 3 Conn., it is laid down
511] *as a general rule, that the holder of an inland bill, or note, need not send notice of non-payment until the day after its dis-

honor. The same was ruled in Lindenberger *v.* Beall, 6 Wheat. 104. In 12 Massachusetts, the point, as to the time of the notice, could not have been before the court, where the parties resided in the same town, for it is stated in the report they lived a full day's journey from each other—the plaintiff residing in Hartford, where the note was payable, and the indorser in Northampton. That case can not, therefore, be considered as authority. If notice, then, in the case at bar might have been given on the day of the demand, and it would not have been too early, or on the subsequent day, and it would not have been too late, and if notice must be personal, or by special messenger, left at the defendant's house, we nevertheless can see no deficiency in the evidence to meet the requisitions of the rule. If notice were necessary, on the day of the demand, this case would fail within the range of the observations of Lord Ellenborough, in Lawson et al., assignees, *v.* Sherwood, 1 Stark. 314. The witness stated, that *either two or three days*, after the dishonor of the bill, notice was given. Notice in two days was in time, but on the third day, too late. His lordship remarked, the witness says two or three days, but the third would be too late? It lies on the plaintiff to show notice in due time, and I can not go upon probable evidence, without positive proof. The evidence left it as probable, that the notice was on the *third* as on the *second* day, and the court could not infer it was on *one* in preference to the *other*. The manner in which it is said positive evidence must be given has led to the impression, that proof of a higher order, or more positive character, must but be given to fix notice on the defendant than to prove any other fact. Such is not the law, nor did the court design to be so understood, but only that there should be positive proof of certain facts, from which the interference of notice might be reasonably inferred. In the case at bar, like the one in Starkie, it is doubtful whether notice was received by the defendant on the day of the demand, or on the subsequent day, but unlike that case, notice on *either day* is sufficient.

We repeat, the evidence of the witnesses, and the admissions made upon the trial, were amply sufficient to warrant the jury in finding for the plaintiff, and judgment must be entered on the verdict.

512] *LESSEE OF THE HEIRS OF THOMAS J. MCARTHUR v. CHARLES P. GALLAHER.

Where lands were located as early as 1787, in the name of an assignee, and the original owner set up no claim until 1814, when he assigned the warrant, as unlocated, to a surveyor or speculator, who located it in 1823, an original assignment may be presumed by a jury, in the absence of all explanation.

RESERVED in the county of Clinton.

This is an action of ejectment for a tract of land in Clinton county. The cause was submitted to a jury at the last term of the court in that county, and, by consent, a verdict taken for the plaintiff, subject to the opinion of the court on the questions of law arising in the case.

After verdict, the defendant moved for a new trial, on the ground that the verdict was against law and evidence, and that the court erred in permitting the patent under which the lessors of the plaintiff claimed title to go in evidence to the jury.

On the trial of the case, a patent was introduced by the plaintiff, bearing date November 12, 1823, granting the land in controversy to Thomas J. McArthur, and describing it as being survey No. 12,352. The land is situated in the Virginia military district, and within the county of Clinton. It was admitted that the lessors of the plaintiff were the heirs of McArthur, and that the defendant was in possession of the land covered by the patent. Here the plaintiff closed his testimony in chief.

The defendant gave in evidence a certified copy of entry No. 729. This entry was made on August 8, 1787, in the name of John Tench, assignee, on a part of military warrant No. 2,377, and was surveyed on March 7, 1794, and recorded June 24, 1796. It was admitted by the plaintiff that the land in controversy was included within the survey.

The defendant further gave in evidence a certificate from the county auditor of Clinton couney, dated December 12, 1825, stating that on that day 43 acres of land, part of entry 729, in the name of John Tench, had been sold for taxes to Josephus Reed and Cyrus Reed, and which certificate had been assigned by the Reeds to the defendant.

Also, a certificate from the auditor of the same county, bearing

date December 31, 1827, stating that on that day he had sold to William Rhenemas and Joseph Reed 267 acres of the same entry for taxes, which certificate was also assigned to the defendant.

Also, a deed from A. J. Williams, collector of taxes for the sixth collection district, dated September 26, 1811, purporting to *convey to James Gallaher, by metes and bounds, 300 acres [513 of land, out of said entry No. 729. This deed was in pursuance of a previous sale for taxes, and refers to another sale of 500 acres from the same entry, sold in the same manner.

Also, a deed from the auditor of Clinton county to William Rhenemas, dated September 11, 1823, purporting to convey 45 acres out of the same survey, sold for the taxes of 1821 and 1822.

Without further proof the defendant claimed title under these certificates and deeds, and rested his case.

The plaintiff then introduced a statement from Henry Massie, which was agreed to be evidence, proving certain practices and modes of doing business in the principal surveyor's office of the Virginia military district.

Also, the deposition of Allen Latham, surveyor for the Virginia military district in the State of Ohio. Latham refers to certain documents attached to his deposition, and verifies them to be true copies from the books in his office. He states that he has been acquainted with the office since 1819, has probably examined every paper therein, and has never seen any assignment of warrant No. 2,377 to John Tench. That it was the general opinion of locators that there had been no such assignment, and he had been told by Col. Anderson, former surveyor, that none such *had been filed* with him in the office.

1. The documents referred to contain a copy of military warrant No. 2,377, issued to John Trezvant, for 6,000 acres of land, which appears to have been located in five separate entries of 1,200 acres each, in the name of John Tench, assignee. These locations were made in 1787.

2. An assignment, on a separate paper, from Trezvant to Cadwallader Wallace, of this warrant. This assignment purports to have been made for a valuable consideration, on September 14, 1814; but the amount of consideration is not named.

3. A certificate by Wallace, that the purchase by him made of Trezvant was on the joint account of himself and John Woodbridge.

4. An assignment by Woodbridge of his interest in the warrant to Thomas J. McArthur. This assignment bears date May 6, 1822.

Another of these documents shows that on October 18, 1823, Thomas J. McArthur, assignee, entered 1,200 acres, a part of this warrant, which was surveyed on the 22nd day of the same month, 514] *and covers precisely the same land included in the entry and survey of Tench, No. 729. The number of this entry of McArthur is 12,352, and was the survey upon which the patent given in evidence by the plaintiff, and under which his lessors claim title, was issued.

The case was argued by SWAN for the defendant in favor of the motion for a new trial, and by LEONARD, contra.

For the defendant, it was insisted that the patent under which the lessors of the plaintiffs claim title was improperly admitted in evidence, being void under the act of 1807, prohibiting surveys upon lands previously entered and surveyed. It was urged that the survey of Tench was a good and subsisting survey, on October 18, 1823, when the plaintiff's entry was made, and that although there was no positive proof of the assignment of Trezvant's warrant to Tench, yet such assignment, under the circumstances in the case, ought to be presumed; at least, the circumstances were such as to throw the burden upon the plaintiff to prove that there was no such assignment. It was further insisted, that the defendant, being in possession, might take advantage of the act of 1807, because in this, as in every other case of ejectment, the plaintiff must recover upon the strength of his own title. At any rate he must show a better right to possess the property than the defendant; but if his patent was void as against the law, he had no right of possession whatever. It was further insisted, that in the absence of proof to the contrary, it was right to presume that the defendant had been in possession since 1811, the date of the tax deed from Williams to Gallaher.

The following authorities were cited: 1 Pet. 628; 6 Ib. 666; 14 Mass. 261; 9 Cowen, 110; 7 Wheat. 151; 19 Johns. 347; 3 East, 192; 8 Ohio, 135; 2 Stark. Ev. 686, 687; 4 Cranch, 431; 5 Ib. 242; 9 Ib. 98; 5 Wheat. 305; 7 Ib. 123, 151; 2 Stark. Ev. 663; 1 Cowp. 214, 215; 7 Cranch, 59; Adams. tit. Ej. 29, 30; 7 Wheat. 59; 4 Cowen, 602; 1 Mass. 251; 4 Burr. 2487; 16 Johns. 200; 9 Cowen, 86; 1 Marsh. 251.

For the plaintiff, it was insisted that the act of Congress of 1807 was only intended to protect those who had a legal subsisting interest in a pre-existing survey, and could not by construction be extended to the protection of mere intruders, or of those who had no interest. That although as between Tench or any one claiming *under, or through him and the lessors of the plaintiff, [515 there might be a question as to the validity of the plaintiff's title, still no such question could arise here, as the defendant does not show any title in himself, nor any regular sale for taxes. It was urged further, that the entry and survey of Tench was absolutely void, and did not appropriate the land included within, because Tench was not the assignee of Trezvant's warrant, and had no interest in it; and the entry and survey being void, any subsequent locator might locate the same land. There is no evidence going directly to prove any assignment, but there is negative evidence conducing to prove the contrary. It was admitted, that in a proper case an assignment might be presumed, but insisted that the circumstances of this case were not such as to justify such presumption. Authorities cited: 3 Ohio, 232; 1 Pet. 628; 6 Pet. 666; 7 Wheat. 122.

Opinion of the court, by Judge HITCHCOCK:

The defense relied upon in this case is, that the plaintiff shows no title, inasmuch as the patent under which he claims is void under the act of Congress of March 2, 1807. This act was passed for the purpose of extending the time for locating Virginia military warrants, etc., between the Little Miami and Scioto rivers; and section 1 contains the following proviso: "That no locations as aforesaid, within the above-mentioned tract, after the passing of this act, shall be made on tracts of land for which patents had been previously issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this section, shall be considered as null and void." 4 U. S. L. 92; Swan's L. 134.

This same provision has been contained in all the laws since enacted, for the purpose of giving further time to make locations upon these lands. And no person acquainted with the subject can for one moment doubt the wisdom of the enactment. Perhaps no one thing has done more to put a stop to litigation within the district, and to quiet the titles of the inhabitants. It is a

beneficial law, and should be construed liberally to effect the object intended. It was not intended alone to settle controversies between locators and speculators—these can usually take care of themselves—but to give peace to the citizens.

The great inquiry is, whether this case is within the provisions of this law. That the land entered and surveyed by McArthur, 516] *and upon which survey his patent was issued, had been previously entered and surveyed by Tench, there can be no doubt. But it is objected by the plaintiff, that admitting the survey of Tench to be a good, valid, and subsisting survey, yet this defendant can not take advantage of the law of 1807, to protect himself, because he does not connect himself with the title of Tench, or show that he is vested with any interest in the survey. To sustain this position, the case of Holt's Heirs v. Hamphill's Heirs, 3 Ohio, 232, is cited. It is claimed that the certificates of tax sales, and the deeds introduced by the defendant, do not show any title in him, nor in any way connect him with the Tench survey. If this were a controversy between Tench or any other person claiming under him, as heir or assignee, this position would be conclusive. Although these papers show that the proprietor of this survey, like many other locators in the district at an early period, was negligent, grossly negligent, in the payment of taxes, still they do not contain all the evidence requisite to prove that the land was properly sold. And in the case of Holt's Heirs v. Hamphill's Heirs, it was held that such proof was necessary before a tax claimant could so far connect himself with a survey as to be protected under the act of 1807, But that case was entirely different from the one now before the court. The entry of Boyer, in whose name the land had been taxed, was withdrawn before the entry and survey of Holt. So that, at the time Holt's location was made, the lands included within it were vacant, and the patent was not affected by the law of 1807. And the court clearly intimate the opinion that had the tax sale been valid, it would have been beyond the power of Boyer or those claiming under him to destroy the rights of the defendants by withdrawing the entry. But as it was not shown to be legal, it was held that the supposed tax purchasers had no right to contest the withdrawal and the rights of the plaintiff under his patent. In the case under consideration, there is no pretense that the entry of Tench has

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been withdrawn, either by himself or any person claiming under him.

But this argument is like an instrument with two edges. It may be used either way. What is it? The lessors of the plaintiff say to the defendant, although John Tench might with propriety question our title, although as to him we admit it would be void, still you have no right to contest it, because you do not properly connect yourself with Tench, by showing that the tax sales under which you claim were legal and in conformity with *the statute. Might not the defendant with propriety [517 reply: "What business have you to examine the legality of my tax title? That is a question between John Tench and myself. By your own admissions your pretended title is void by a law of the United States, and it is not for you to say my tax title is irregular and void."

The defendant is in possession of this land, and in possession under claim of title. Possession itself is so far evidence of title, that it will be protected until a better title is produced. The general rule is that a plaintiff in ejectment must recover by the strength of his own title. He must show a right of possession, at least a superior right to that of a defendant. In the case under consideration the plaintiff introduces a patent, and the proofs in the case show, that the entry and survey upon which this patent was predicated, were made upon land which had been previously surveyed. A law of Congress says, that a patent issued under such circumstances "*shall be considered as null and void.*" Such patent, if "*null and void,*" conveys no title, and when a positive law of Congress says it shall be "*null and void,*" this court can not with propriety say it is good and available.

It is urged, however, by the counsel for plaintiff, that the survey of Tench was void and did not appropriate the land included within it. If so, it follows that the location of McArthur was properly made, and the plaintiff is entitled to judgment.

The reason assigned why the survey of Tench is void is, that Tench had no assignment of the Trezvant warrant. Whether he had such assignment is the great question in the case, and the one upon which it must be decided.

There is no positive evidence of such assignment. On the contrary, Allen Latham states that he has searched the office of the principal surveyor and can find none. This is the place where it

should have been deposited. He states further that it has been long the opinion of locators that there was no assignment. This opinion may possibly be entitled to some weight; but really it is difficult to see upon what principle it can be received as evidence. If the opinions of locators on these subjects were always the same, it might do to rely upon them; but as a matter of fact, we know that they are subject to change, and some have been so uncharitable as to suppose that they varied with their respective interests. Latham states further, that Colonel Anderson, former principal surveyor, had told him that no such assignment had been deposited in the office.

518] *This being the negative testimony, and there being no positive testimony in the case proving an assignment, the plaintiff must succeed, unless the facts and circumstances are such as to warrant the court in presuming an assignment. It must be remembered that no particular mode of assigning military land warrants was prescribed by law. It might be done by an indorsement upon the warrant itself, or on a separate paper. Nor was there anything in the law requiring it to be done even in writing. That mode was adopted most convenient to the parties. 7 Wheat. 122. Courts will, under circumstances sufficiently strong, presume a grant or a deed, and there is no impropriety in a proper case made in presuming the assignment, and such presumption was made in the case of Bouldin *v.* Massie's Heirs, 7 Wheat. 122; and in that case the subject is very fully and at large discussed.

What, then, are the circumstances of this case? In the year 1787, an entry is made on a part of the Trezvant warrant in the name of Tench, assignee. This entry was surveyed March 7, 1794, and recorded June 24, 1796. All this transpired, it is believed, very soon after the office of the principal surveyor had been established, and probably before the business of that office was reduced to a system. Would the principal surveyor have permitted this, if there was no evidence of assignment produced to him? It will be remembered that he did not say to the witness, Latham, that the warrant was *not assigned* to Tench, but that no assignment had been *deposited in the office.* Trezvant's warrant, No. 2,377, authorized the holder to locate 6,000 acres of land. In 1787, not only entry No. 729, of 1,200 acres, was made on this warrant, in the name of John Tench, assignee, but four other entries on the same warrant and in the same manner, of 1,200 acres each. From

this time until 1814, a period of more than twenty years, we do not find Trezvant, the original owner of this warrant, making any inquiry after his warrant, or his land. Is it thus, that a man having a claim to 6,000 acres of land, like that in the military district, usually conducts with respect to it? Or rather, is it thus, that a man usually neglects attending to his rights and his property? Trezvant was not in a foreign country; he was a resident of the adjoining State of Virginia. But even in 1814, Trezvant did not inquire after this land. But Cadwallader Wallace, a locator of lands in the district, visits him in Virginia, and procures *from [519 him an assignment of the warrant, not upon the warrant itself, for that was in the surveyor's office, but upon a separate paper. This assignment is expressed to be for value received or for a valuable consideration, but the amount is not named. If it had been, some light might have been thrown upon the subject. At least, we should have known the estimate which Trezvant put upon 6,000 acres of Ohio land.

Although the assignment was made in 1814, the assignees make no location until 1823, another period of almost ten years. They then wait fourteen years longer, until 1837, before they attempt to enforce their claim by suit. At this time, Colonel Anderson, the principal surveyor, and most others who may be supposed to have been intimately acquainted with these transactions, are dead, and their testimony can not be had. Taking all these circumstances together, and it seems to me to be a strong case in which to presume an assignment, and such is the opinion of the court.

Tench, then, having an assignment of this warrant, and having procured the entry and survey of No. 729 to be made, and that being a subsisting survey at the time of the entry and survey of the plaintiff's lessors, their patent is void, and they have no title to the premises in controversy.

A new trial will be granted, costs to abide the event of the suit.

THE BANK OF UTICA *v.* JOSEPH CARD.

A discharge under the New York insolvent laws must be made by an officer having the qualification of a counselor at law, or it is invalid.

DEBT upon a judgment rendered in the State of New York, in 1826, reserved in Cuyahoga county.

The original suit was founded on a note given by the defendant, then, and for some time after, a citizen of New York, within which the corporation plaintiff exists. The defendant's plea in bar sets up a discharge under the insolvent law of New York, reciting particularly the proceedings, from which it appears that Card, then a citizen of Ohio, being in Buffalo on business, was arrested on civil process, and filed his petition for discharge under the insolvent law before Burnett, first judge of Erie county court, of the degree of counselor at law, who assigned a day for hear-
520] ing, but being absent from the county *on that day, one of the judges of the county court appeared, heard the application, and granted the discharge, etc. The replication admits the proceedings and discharge, but allege they are *coram non judice* and void, because the judge of the county court, who ordered the discharge, was not of the degree of counselor at law.

To this replication there is a general demurrer and joinder. The only question raised is, whether the judge of the county court, not of the degree of counselor at law, had authority to hear the application and grant a discharge?

ANDREWS and FOOTE, for the demurrant:

Cited 2 Rev. St. N. Y. 34, which provides that application for discharge, etc., "may be made to circuit judges, supreme courts and commissioners, first judges of county courts, and any other judge of said court of the degree of counselor at law, in the supreme court, and also to any county judge in said article specified." Also to the same law, articles 5 and 7, which provides that in case of the death, absence, etc., of any such officer, after proceedings have been commenced, the said proceedings may be continued by his successor in office, or by any other officer residing in the same county, who might have instituted such proceedings, in the same manner, and with the like effect, as if originally commenced before him. They insisted that these provisions, one

expressly authorizing such proceedings as set forth in the plea, to be instituted before a county judge, whether of the degree of counselor at law or not, and the other giving the same effect to proceedings continued by him, as would be given to those originally commenced before him, gave validity to the discharge pleaded.

R. HITCHCOCK, for plaintiff:

Contended that, by the whole act taken together, it will appear obvious that no power to *discharge* the petitioning debtor was intended to be conferred upon any single judge, unless of the degree of counselor at law; and that the act did not embrace the case of a citizen of any other state than New York.

LANE, J., delivered the opinion of the court:

The only point arising in this case, not before decided in 7 Ohio, *2 pt. 170, is, whether a discharge under the New York law [521 is valid, if granted by a judge who is not a counselor at law? This question is readily decided by inspection of the statute. Article 7 provides, that applications for the discharge of an insolvent debtor from his debts, under article 3, may be made to either of the following officers: Circuit judges, supreme court commissioners, first judges of county courts, or any other judge of said courts of the degree of counselor at law. Section 4 provides for the institution of these proceedings in another county, where there is no such officer in the county of the insolvent's residence. Section 5 makes provision that in case of death, removal, or disability of the officer before whom proceedings were commenced they may be continued under any other officer who might have originally instituted the proceedings. 7 N. Y. Rev. Stat. 34. Nothing, then, can be more evident, than that no officer not possessing the qualification of the degree of counselor has any jurisdiction to act in these proceedings; so that a discharge, like the one pleaded, granted by a judge not possessing this character, is void.

The demurrer to the replication is overruled. Judgment for plaintiff.

S. AND E. W. PERRY v. GEORGE P. TORRENCE.

A state law including steamboats as a portion of the property subject to taxation, is not unconstitutional.

THIS case was adjourned from the county of Hamilton.

The whole matter of it is explained in the opinion of the court.

WRIGHT and HODGES, and WRIGHT and WALKER, for plaintiff.

H. STARR, for defendant.

Judge GRIMKE delivered the opinion of the court:

This case comes before the court on the following agreed state of facts: The plaintiffs are owners of the steamboat Adriatic. They reside in Cincinnati, where the boat was built. She was enrolled first at Cincinnati, and afterward at Louisville, and is one of the largest class of boats intended for and employed in the [522] *trade on the Mississippi; but touching occasionally at Cincinnati, to receive and discharge freight. The defendant is treasurer of Hamilton county. In 1835, a tax was levied upon this boat, and by agreement between the parties, paid without prejudice to the right of trying the legality of the tax.

The tax was levied under the act of 1831. Section 1 declares that all stock or capital invested in steamboats shall be subject to taxation; and section 6 that all stocks or interest in steamboats shall be valued upon the statement of the owner under oath. It is admitted, that if this law is constitutional, the tax was legally collected, and that this action, which is brought for the recovery of it back, can not be maintained. It is contended:

1. That it is repugnant to the fundamental principles of taxation.

2. That it is repugnant to the constitution of the United States; and,

3. That it is a violation of the ordinance of 1787.

The first objection we are not authorized to consider; it is addressed to the legislature, and not to the courts. No state has ever been able to devise a perfectly just system of taxation. The laws which govern the distribution of wealth are so imperfectly understood, that the greatest wisdom is perhaps unequal to the task. Moreover, the two classes of individuals, those who ad-

minister the practical affairs of society, and those who are masters of the science of political economy, dividing between themselves the actual amount of knowledge, the whole even of that knowledge can seldom be made to bear upon the interests of the community.

It is one fundamental principle of taxation, however, that the property of all the citizens should be made to contribute as equally as possible to the public burdens; and the law under which this tax was levied was probably framed for the purpose of attaining this great object. It imposes a general tax upon stock of every description. If it had exempted capital invested in steamboats, a disproportionate burden would have been imposed upon the class of citizens taxed. Similar laws exist in Connecticut, Massachusetts, and New York; only in the former state, it is provided that if the boat is taxed in any other state, it shall thenceforth be relieved from the imposition there. If it is fit and proper that all the citizens should be made to contribute, as nearly as possible, equally to the expenses of government, no rule more just can be adopted than that which considers *property of this description* *as situated in the place where the proprietors reside. It [523 is not on the technical principle that the situs of personal property is there where the domicile of the owner is found; for that would embrace property which was exclusively and constantly employed in another state. It is because a boat which is navigated beyond the boundary of any one state can not, in the nature of things, be considered as located, for the purposes of taxation, in any other place than that where the owners reside.

Is the law repugnant to the constitution of the United States? It must necessarily be difficult in a government so complex as ours, composed of one government within another, or perhaps more properly, of two jurisdictions standing side by side of each other, to prevent all interference of their respective powers. The wisdom of their contrivance consists in their touching each other in so many points; and the occasional inconvenience which this produces, is only the accidental result of the general genius of the system. Health laws, inspection laws, wreck laws, and harbor regulations are only a few of those instances in which state legislation may appear to interfere with the acknowledged power of Congress to regulate commerce; and yet these laws are universally conceded to be valid, because they act upon a subject matter

which is within the appropriate sphere of state legislation. The laws for regulating the internal commerce of a state, those which have relation to the construction of roads and canals, constitute an immense portion of legislation, which is reserved to the states; and yet they may more or less interfere indirectly with even the exclusive power of Congress to regulate commerce among the states.

This occasional interference, which no human foresight could avoid, and which no human wisdom could altogether prevent, is even necessary to carry out the general designs of the government. It creates a salutary control upon the powers which are claimed and exercised by the two jurisdictions, and prevents either from indulging in an unlimited exertion of the authority confided to it. The laws of this state, which impose a tax upon the capital stock of merchants, and more particularly those which impose a duty on boats navigating the canals, necessarily affect its commerce with other states; and yet this has never been suggested as a reason why such laws are unconstitutional. If there is one class of powers which enters into the very definition of the authority to regulate commerce, there is also another, which is of the very essence of state legislation, and which can not be de-
524] nied *to the states, without impairing the very constitution whose integrity is intended to be preserved.

In the case of Gibbons v. Ogden, 9 Wheat., it was admitted that the taxing power was not a part of the power to regulate commerce. It had been ruled differently before; but in that case it was admitted that the two powers were substantive and distinct from each other; and that the states might have levied duties on imports and exports, if the constitution had not contained a separate prohibition on the subject. And yet it is evident that there could be no more formidable interference with the power to regulate commerce, than the imposition of duties upon imports and exports.

But if this tax is not repugnant to the constitution on these grounds, does it infringe that clause which forbids a state from levying a tonnage duty? A tonnage duty is a duty upon a vessel without any reference to the place where her owner resides, without any regard to the jurisdiction within which the capital invested is owned. It is then most manifestly a tax upon the boat as an instrument of navigation, and not a tax upon the prop-

erty of citizens of the state. This distinction, I think, shows the reason why a power so general and indiscriminate, as the imposition of a tonnage duty, was withheld from the states; and it affords an equally good reason, why a tax which confines itself exclusively to the property of our own citizens, can not be considered within the letter or spirit of the prohibition. The former power would interfere directly with the taxing power of other states; while the last would be the mere exercise of a power, which appropriately belongs to a single state. One great design of the federal constitution, so far as the intercourse among the states is concerned, was to prevent a conflict of their respective powers; and that great end is not infringed, but is carefully preserved, by the express provision of our law, which restricts the tax to the property of citizens of our own state. The New England confederation, the assembly which met at Albany, and the convention at Annapolis, which led to the formation of the constitution of the United States, were all more or less designed to guard against the countervailing regulations of the different states. They were intended to prevent the encroachments of one state upon the legitimate powers of the others, and not to narrow the sphere of state legislation further than was absolutely necessary for that object.

In McCulloch *v.* Bank United States, 4 Wheat., it was held, *that it was not competent to a state to tax the franchises [525 of the bank; but it was admitted that a state might tax the stock of individuals living within the state, although it might be argued, with great force, that this was doing indirectly what it was not permitted to do directly. But the rights of the states are, themselves, substantive and independent powers, which Congress can neither usurp nor impair, merely because it is sometimes difficult to define the exact boundary which terminates those powers. The repugnance of the power exercised in this case, to that clause of the constitution which prohibits the states from levying a tonnage duty, is as little perceivable as were the two apparently conflicting powers in the case of McCulloch *v.* Bank of United States. The two cases are, to be sure, *diverso intuita;* but the analogy between them is not, for that reason, the less strong. It may be necessary, in both, to make nice distinctions; but the making distinctions constitutes, if I may so express myself, the chief exercise of the human mind in every department of knowledge,

whether theoretical or practical. It is one of our privileges, and not one of our vices, that we can not always see our way clearly to the performance of great public duties without much thought, attention, and study.

The late case of the City of New York *v.* Miln, 11 Pet., in which was upheld the constitutionality of a law of New York, making it obligatory on all captains of vessels engaged in the foreign trade, to give bonds that the emigrants on board should not become a public charge, shows that there is as strong a disposition in that court to maintain the just powers of the states as there is to preserve, unimpaired, the acknowledged powers of the general government. The states must not be regarded as mere municipal corporations. The happiness and welfare of the people are as much, if not more, wrapped up in their administration than in that of the federal government, inasmuch as the sphere of legislation which is prescribed to them comprehends a greater variety of vital interests. He was a wise man (Oliver Ellsworth), who, in the convention which framed the constitution, declared that he did not want a splendid national government—he wanted a government which would give him domestic felicity. The saying showed that he thoroughly understood the great purpose for which government was created.

The law of 1831 is not unconstitutional any more than would be a law which imposed a tax upon every barrel of flour or tobacco manufactured. Such a tax might be argued to be virtually 526] a duty *upon exports, because a large portion of the flour and tobacco would be actually exported. The toll exacted from canal-boats, too, might be contended to be a tax upon goods imported from another state, because the owners of the goods paid the tax. There is no power in words, but there is power in just and correct distinctions. A tax upon lands is, in one sense, a tax upon exports; because *it is certain* that some portion of its produce will be exported. But it would not be a tax upon the privilege of exporting; neither the design of the law nor the form in which it was clothed would authorize us to say so. There could be no visible bond of connection between the federal and the state governments if their respective rights and interests did not lie in the near neighborhood of each other.

A third ground taken is, that the tax is repugnant to article 4 of the ordinance of 1787, which declares that the navigable waters

leading into the Mississippi shall be common highways, and forever free. Even admitting that the article applies to citizens of this state, and not to citizens of other states, with regard to whom invidious distinctions might be made in the form of discriminating duties, if the power contemplated were permitted, yet this tax can not be regarded as a restraint upon the right of navigating those waters. The tax presupposes the right. Its efficacy as a tax results from the very liberty of exercising it, and could have no operation if the right were disturbed.

The conclusion, on the whole, is, that the tax complained of does not interfere with the power of Congress to regulate commerce; nor can it be regarded as a tonnage duty, because that is a tax which is levied upon the vessel as an instrument of navigation, and without reference to the place where she is owned; nor is it a violation of the ordinance of 1787.

RILEY AND VAN AMRINGE *v.* JOHNSON, ANDERSON, AND SHIPLEY.

Where signatures are obtained to a blank paper, to be filled up for money, upon false pretenses, and are delivered in blank in payment of a precedent debt, and the note written by the creditor's agent, the securities are not bound.

ASSUMPSIT, reserved in Muskingum county.

The issue of fact, on *non assumpsit*, was submitted to the court under the statute, instead of a jury. The facts, agreed by counsel, are as follows:

That the defendant, Johnson, resided in Martinsburg, Knox *county, in May, 1837, and had for years carried on an ex- [527 tensive business as a merchant. The 2d of January, in that year, he was indebted to the plaintiffs, who resided in Philadelphia, Penn., more than $3,000 for moneys lent to him by them, and Van Amringe called upon him at Martinsburg for payment, but obtained nothing. On that day Van Amringe and Johnson rode together to Nashport, where the defendant, Anderson, resided, and had a store, in connection with Johnson, conducted under the name of Johnson & Anderson. They arrived late in the afternoon,

and took lodgings near the store. In the evening Johnson called on Anderson, and inquired if he did not want money? Anderson replied, he could use it if he had it. Johnson then said, he was going to Zanesville the next day and would try the banks; that it was best to draw two notes for $1,500 each, and if he could get the $3000, $1,000 of it should go to the Nashport establishment. He then wrote in figures, $1,500 at the top on the left hand of two pieces of paper, and he and Anderson and Shipley signed their names, following each other, to each piece of paper, on the right hand, some distance from the top, leaving room, and intending to have promissory notes written over their signatures. Johnson took the papers, returned to his lodgings, and handed them to Van Amringe, who dated them January 2, 1837, and filled them up as notes, for $1,500 each, one at ninety days after date, payable to the order of the plaintiffs at the Bank of Granville; the other in like manner, at four months. Upon these notes this suit is brought. Van Amringe and Johnson left Nashport the next morning, the former not having visited the store or met Anderson during his stay. Van Amringe received the notes of Johnson in part of the plaintiffs' account against him, and gave him credit on account for $3,000. He left them at the Granville Bank for collection, where they were protested for non-payment, and the plaintiffs then charged them to Johnson. Johnson, up to May, 1837, was in good credit, supposed to have ample means, and responsible for a much larger sum than $3,000; but about that time *absconded totally insolvent*, leaving the plaintiffs wholly unpaid, and without other security than the notes.

STILLWELL, for plaintiffs:

Insisted, that the facts entitled them to a verdict for the amount
528] *of the notes, as no fraud is proven upon the plaintiffs in obtaining the notes, and none will be presumed from the circumstances. These notes were negotiable, fairly taken in *payment*, not received as collateral security. He commented upon the following cases cited: 8 Cow. 423; 9 Wend. 170; 12 Wend. 523, 593; 10 Wend. 85; 20 Johns. 636; 5 Johns. Ch. 54; 3 Kent's Com. 81; 2 Wheat. 66, 73; 2 Peters, 170, 182; 5 Wend. 66; 16 Pick. 574. If we are not entitled to recover against Anderson, with whom the issue is joined, we claim judgment against the other defendants, who are in default. As to this he cited 1 Pet. 47; 11 Pet. 86.

GODDARD and CONVERSE, contra:

Claimed that the law arising on the state of facts is with the defendants on the issue; that Van Amringe was grossly negligent in taking such an obligation in blank, when by a walk of only a few feet he could have seen the defendant Anderson, and learned if he intended to be bound. They cited 8 Wend. 423; 9 Wend. 170; 10 Wend. 85; 12 Wend. 523, 593; 16 Pick. 579.

Judge WOOD delivered the opinion of the court:

Do the facts in this case give the plaintiffs a right to recover? Johnson was in the plaintiffs' debt a sum greater than the notes he delivered. The notes were negotiable, and if negotiated for a valuable consideration without notice, the right of the holder would prevail, even against a *true* owner; but such consideration must be actual, the holder must have incurred loss, by giving credit to the paper, or by paying a fair equivalent for it. If he has done, if the plaintiffs have done neither, but have merely taken the paper for a pre-existing debt, their condition is improved if they recover, but nothing is lost by their failure, as they remain as before. In such case the equity of the holder is not superior to that of the owner. Such is substantially the language of the court of errors in New York. 20 Johns. 637. Spencer, Judge, said, that in all the cases cited, in which such transfer had been valid, the notes or bills had been taken in the usual course of trade, for a present consideration, and not as security for an antecedent debt. And whoever receives a note, negotiable on its face, in payment of a precedent debt, takes its subject to all its equities between the original parties. In such cases, the holder has no *equity superior to the maker, and the law will leave him [529 in possession who already has it. These principles are recognized in 10 Wend. 86, and appear to decide this case. The notes in question were not received in the usual course of trade, for a valuable consideration, in the meaning of those terms, applicable to such cases, but for a precedent debt. Failing in this suit, the plaintiffs lose nothing. They remain in the position they were in when they took the notes, and may sue on their original cause of action. The notes received were no payment and bar no right.

We have, so far, considered the transaction between Johnson and Van Amringe *bona fide*. It might, we think, be viewed in

a very different light. During the visit of these gentlemen at Nashport, Van Amringe remained at his lodgings; he did not visit the store of Anderson, though himself a merchant, and within a few rods twelve or fifteen hours; made no inquiries about Anderson's business or standing; was not seen by him; but as soon as the notes were handed to him, he filled them up to himself, retained them as his own, and the parties departed together. The state of case, and conduct of these men, strongly impress the mind with the belief, that the whole business was previously arranged between them; and this impression is strengthened by the subsequent absconding of Johnson *totally insolvent.* If this is correct, fraud is fixed upon the plaintiffs. In such a state of case they can not recover. A note made for the maker's own accommodation for discount at bank, can not, upon the refusal of the bank to discount, be transferred to one having knowledge of the facts, so as to enable him to recover. 6 Ohio, 249.

Judgment for defendant.

GEORGE AND WILLIAM RENNICK *v.* PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF CHILLICOTHE, AND FELIX RENNICK.

A creditor having dealt with parties to a conveyance, regarding it as valid, can not afterward impeach it for fraud.

RESERVED in the county of Ross.

This case came before the court upon bill, answers, replications exhibits, and testimony.

The facts of the cases are stated in the opinion of the court, so 530] *far as the same are necessary to the proper understanding of the points decided.

The case was argued at length by T. SCOTT and LEONARD, for the complainants, and by H. STANBERY, for the respondents.

On the part of the complainants, the following authorities were cited: 2 Eq. Cas. Abr. 603; 16 Wms. 776; 2 Atk. 53; 2 Stra. 1017; 1 Hopk. Ch. 231; 2 Pick. 517; 3 Ib. 50; 1 Bibb, 334.

For the defendants, the following: 2 Chan. Cas. 83; 6 Cranch, 8.

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Opinion of the court, by Judge HITCHCOCK:

Although this case seems to be involved in some obscurity, and many points have been raised and argued by counsel, yet, upon a careful examination, there does not appear to be any serious difficulty. The great object is to ascertain the intention of the parties in their several contracts and dealings, and when this is once ascertained, the case is easily disposed of.

The case appears to be this: On April 11, 1821, Felix Rennick was indebted to the Bank of Chillicothe, in the sum of $22,465.44. Of this amount, $12,465.44 was secured by notes indorsed by Fullerton, Waddle, and Carlisle, and $10,000 was without any security. At the same time F. Rennick was possessed of a farm in Ross county, called the high bank farm, containing 1,200 acres of land. This farm, on April 14, 1821, he mortgaged to the bank to secure the payment of the aforesaid debt of $10,000, the said debt being made payable in installments, the last of which would fall due on April 18, 1826.

On April 11, 1821, Felix Rennick, for the expressed consideration of $23,000, conveyed the high bank farm to his brothers, George and William Rennick, the complainants, by deed absolute upon its face. But, at the same time, a contract in writing was given by George and William to Felix, binding themselves to pay him $13,000 on or before April 11, 1826, and at the same time to reconvey to him 300 acres of land, of an average quality with the whole farm, and also a like quantity on or before April 11, 1830. There is a stipulation in the contract, that George and William may pay the $13,000, by clearing off *incumbrances upon [531 the land. It is observable that the last installment of the debt to the bank, secured by mortgage, fell due on April 11, 1826; that the whole debt, with interest, would, at that time, amount to about $13,000, and that there was no other incumbrance on the land.

Six days after this transaction, the bank recovered a judgment on one of their notes against Felix, indorsed by Carlisle, Fullerton, and Waddle, for $2,891. And in March following, recovered two other judgments against the same, one for $1,035, the other for $8,907, which three judgments included all the debts due from Felix to the bank, exclusive of the one secured by mortgage, and would have operated as liens upon the high bank farm, but for the conveyance to the complainants before referred to.

On March 24, 1823, the high bank farm was sold by the Ren-

nicks to Rees McNeil for $23,000—$10,000 to be paid in hand, and the balance in annual payments of $2,000 each, with the exception of the last, which was $1,000.

In making this sale, Felix was instrumental, and it was made for his benefit, with an understanding between him and his brothers, that the proceeds should first be applied in payment of debts secured by the mortgage on the land, and the balance in payment of the other debts due the bank. An agreement was made between the bank and Felix, that he might liquidate his debt in bank stock at par, and on July 9, 1823, he paid, in this way, $5,605.05, including stock in his own name, and a dividend on the same. There seems to have been an arrangement between the complainants and Felix, and probably with a view to this agreement between Felix and the bank, that the proceeds of the sale to McNeil should be applied in the purchase of bank stock, which was then at a discount, and which the bank was to receive at par in payment of Felix's debt; and by this operation it was supposed the whole debt would be liquidated, and a balance left of more than $2,000.

On January 22, 1824, the notes of McNeil for $13,000 were deposited in bank by complainants, and a receipt given them, reciting "the deposit of the notes, the indebtedness of Felix, the giving of the mortgage to the bank for a part of the debt, the sale of the land to the complainants after the mortgage, and that the 532] bank had agreed to receive all its *debts in the stock of the bank at par value, in consideration of certain payments then lately made, and in consideration of complainants pledging and depositing McNeil's notes as collateral security for the payment of the said Felix's debt, *and when said debt should be paid*, the notes, or such of them as should be unpaid, should be returned to complainants; or if the complainants should wish to retaint he notes, they might do so by giviug such other security as the bank might accept."

A considerable amount has been paid into bank in stock and money, more than sufficient to satisfy the debt of Felix secured by mortgage, but not sufficient to satisfy the other debts due the bank. Within a short period, George and William Rennick have paid to the wife of Felix, he being still living, $14,000 to procure the relinquishment of her right of dower in the high bank farm.

Such are the prominent facts in this case.

The complainants contend that the moneys which have been paid into bank shall be first applied to the extinguishment of the debt secured by mortgage, and insist that if the contract of January 24, 1824, does not secure to them this right, it is differently worded from what was intended and should be reformed. The defendants deny that there is any mistake in the contract, and there is not a particle of testimony to prove any mistake. We must, therefore, take it as it is. By this agreement no difference is made between the different debts, but the intention is manifest that the whole amount of $23,000 should be applied in the way of payment. Not in the way of payment, first of one debt and then of another, but of the whole debt. The debts from that time may be considered, so far as these parties are concerned, one consolidated debt. And it is manifest that the parties at the time supposed that the proceeds of the sale to McNeil, in the way those proceeds were to be applied, would more than satisfy this whole debt.

But as it is found that the whole bank debt has not been, and probably will not be paid from the avails of the sale to McNeil, the complainants claim that they have a right to direct to which part of the debts, due from Felix, the payments made into the bank shall be applied, and upon this principle they seek to have them applied in extinguishment of the mortgage debt. Were there no contract in this case by which the application of the payments was to be controlled, there might probably be some difficulty. We suppose, however, there is no difficulty in ordinary *cases. Where there are different debts due, the debtor has [533 a right, when he makes payment, to direct to which it shall be applied; if he gives no direction, the creditor is authorized to apply it as he may think proper. But in this case there was a contract, and this must govern. By that contract no distinction was made between the different description of debts. They were all treated as one debt, and this debt was to be satisfied, as far as it could be done, with the $23,000.

The defendants contend that the complainants undertook to satisfy the whole debt; in other words, that they became securities for Felix, that the whole debt to the bank should be paid, and therefore that they have a right to hold on to the mortgage until the whole debt is paid. They contend further that the conveyance

from Felix to George and William was fraudulent as to the bank, consequently that their judgments attached as a lien upon the land, and that they are not, therefore, under any obligation to release the mortgage until the judgment liens are satisfied. It seems to the court that this claim of the defendants can not be sustained, and that they are mistaken in part, at least, with respect to the contract of January 22, 1824.

That the conveyance was, in contemplation of law, fraudulent, we think there can be no doubt. There was a secret trust. The object was to relieve Felix in his embarrassed situation, and this was to be done by placing his property in a situation that it could not be reached by execution. The only payment toward the land which was to be made, was a sum sufficient to relieve it from the lien of an existing mortgage, and after this was done, the residue of the land was to be reconveyed. The conduct of the parties subsequently shows that it was never intended that this property should rest in the complainants for their use. When sold to McNeil, it was done in part, at least, through the agency of Felix, and done, too, entirely for his benefit. This conveyance being fraudulent, the judgments of the bank would operate as a lien upon the land in the hands of the complainants, or of any other person having notice of the fraud. But although this is true, the defendants could have received no more toward their debts, whether secured by mortgage or judgments, than the value of this land when sold at sheriff's sale. These were, in part, the considerations which induced the complainants to enter into the arrangement of the 22d of January.

But it is now too late for the bank to set up this fraud. They, by their contract of the 22d of January, have agreed, upon the 534] *stipulations therein contained, to receive the proceeds of the sale to McNeil in satisfaction of their debt, in part or in whole, as the case might be, thereby, in effect, recognizing the conveyance to the complainants to be good and available. By this contract the complainants assert that these proceeds shall be thus applied. But do they undertake to say that the debt due from Felix shall at all events be paid? They were under no obligation, either moral or legal, to do this, nor is there anything in the terms of the contract, from which it can be inferred that any such thing was intended. They were willing to obligate, and did obligate themselves, that the $23,000 received from McNeil, should go to sink

the debt of Felix; beyond this, they did not bind themselves. They undertook, however, that this $23,000 should be applied in the purchase of stock, if it could be done at a discount; in the first place, the $10,000, and the balance from time to time as it fell due, and this stock was to be transferred to the bank. And this is a part of the agreement, the performance of which the bank had a right to require.

It is claimed, on the part of the complainants, that they are entitled to a credit for the $14,000 paid to Mrs. Rennick, to procure the relinquishment of her right of dower. But this can not be allowed. The husband is still living, and this right of dower is a mere expectancy. It may or may not be a charge upon the land. Besides, the bank were to have the benefit of the whole $23,000.

Whether they have had this benefit, we know not from any papers before us. The case must therefore be referred to a master to inquire:

1. How much of this $23,000 has been expended in the purchase of bank stock.

2. How much the complainants have paid into the bank in cash on the debt of Felix Rennick.

3. Whether the complainants have at any time neglected to purchase bank stock when it could have been procured at a discount, and when they had or might have had money in their hands, made by the sale to McNeil.

4. If they have thus neglected, what has been the loss on that account.

5. Whether moneys, the fruit of this sale to McNeil, have been detained by complainants an unreasonable length of time.

The master will examine witnesses, and the parties themselves under oath, if deemed necessary; and will also have access *to [535 the books of the bank, for the purpose of aid, in stating an account, and will make report at the next term of this court in Ross county. With his report, he will return the testimony by him taken, on which it is based. And for the coming in of the report, and for final decree, this cause is continued and remanded.

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DAVID PEABODY *v.* CHARLES FISHER.

Exception does not lie, after verdict, to the averment of a demand of payment, on a day before or after the expiration of the days of grace, where such averment is made under the usual videlicit, and with an additional averment that the bill was due.

ERROR to the common pleas of Muskingum.

Fisher sued Peabody in the court below as drawer of two bills of exchange for $298.58, both dated June 16, 1836, one at eight and the other at ten months. His declaration is in three counts, viz:

1. On the bill at eight months.
2. On the bill at ten months.
3. The common counts for money had and received, and upon an account stated.

Peabody demurred specially to the first and second counts. To the third he pleaded *non assumpsit* as to the money had and received; and as to the account stated, moved to strike that much out.

The demurrers were heard and overruled, and, the cause being submitted to the court, judgment was rendered for the plaintiff. To reverse which, Peabody brings this suit.

GODDARD and CONVERSE, for the plaintiff in error:

The bills declared on do not appear to be made payable at *any bank*, and therefore are not supposed to be entitled to days of grace. If so, the first bill matured on the 16th of Febuary, and the demand of payment and notice on the 18th fixes no liability on the 18th. The ten months bill, upon the same principle, matured on April 16, 1837. If the days of grace are computed, it matured on the 19th. There is no averment of its presentation on either of these days, but its presentation is averred on the 20th; the first was presented at two days' grace; the second at four days' grace; therefore, the laches of the holder has discharged the drawer. 6 536] Ohio, 66; 1 Ib. *508. The account stated is improperly inserted. The indorsement on the writ is upon two bills, and "also for money had and received by defendant to use of plaintiff." The party, under the statute, can not declare for anything not expressed in the indorsement. 29 Ohio L. 58. So there was no plea, but a notice to strike out.

GEO. JAMES and H. STANBERY, contra.

Thought it sufficient to say, that the third count was unquestionably good; the clause for money had and received will sustain the judgment, without resorting to the account stated. The motion to strike out has not been pressed or decided; but the court will not reverse a judgment because the common count contains a cause of action not specifically indorsed on the writ. A bill of exchange is entitled to days of grace whether payable at a bank or not. 7 Ohio, 223.

Judge GRIMKE delivered the opinion of the court:

It is supposed that the first count is defective, because it avers a presentation of the bill for payment on the 18th of February, the second day after the bill became due. The averment is, "that afterward, when the bill became due, to wit, on February 18, 1837, the said bill was duly presented." Chitty, in his treatise on Bills, 494, n. *k*, says, the day is material, unless there be an express averment that the bill was presented when it became due, in which case, a mistake in the day after a videlicit would not be material, and this though the day stated be a Sunday. He adds, the better way is, therefore, to state the time of presentment generally. Doug. 679. The quotation refers to a precedent of a declaration, as the precise form of this. The first and second counts are, therefore, good according to the authorities.

The third count is also good. A motion was made to strike out of that count the account stated clause, because the indorsement on the writ did not state that cause of action. It would be carrying the nicety of the law too far, but even admitting it correct, the bills of exchange were admissible in evidence under the clause for money had and received. The judgment is affirmed.

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*PEABODY v. FISHER. [537

GRIMKE, J.:

This is another case between the same. The declaration is upon a bill of Peabody for $375, dated January 30, 1837, at five

months; and avers its presentation on the 3d of July, when the bill became due. It was presented in proper time, inasmuch as bills of exchange are commercial paper. But if they were not, the declaration is good for the same reasons given as to the two first counts in the last case. Judgment affirmed.

Wilber Cahoon v. The State.

It is no offense against the statute, March 7, 1835, section 29, to pass bills of an unincorporated bank in actual existence.

Error to the common pleas of Lorain county.

The plaintiff was indicted at November term, 1838, for uttering and publishing a note, "purporting to be issued by the Exporting, Mining, and Manufacturing Company's Bank of Illinois," and avers it was falsely and fraudulently published, passed, and put into circulation by Cahoon, he knowing that such bank never did, in fact, exist.

Upon this indictment Cahoon was put upon his trial. After the evidence was closed, the prisoner's counsel prayed the court to instruct the jury, that if they found the note offered in evidence was issued by an *existing* bank or company, they should acquit, whether the bank was incorporated or not. The court refused this charge, but instructed the jury, that if they found that the note was issued by an existing company, they should convict, if the prisoner knew that the company had no legal charter from the Illinois legislature. This was excepted to, and the jury found the prisoner guilty, and he was sentenced to the penitentiary for five years; to reverse which, this writ is prosecuted.

W. Stillman, for the prisoner.

No counsel appeared for the state.

538] *Judge Wood delivered the opinion of the court:

This indictment is drawn upon section 29 of the act for the punishment of crimes, passed March 7, 1835 (33 Ohio L. 39), which en-

acts, "that if any person shall make, alter, publish, pass, or put in circulation, any note or notes, bill or bills, purporting to be the note or notes, bill or bills, of a bank, company, or association, which never did, in fact, exist, such person or persons, knowing at the time of publishing, passing, or putting into circulation any such note or notes, bill or bills, that the bank, company, or association, purporting to have issued the same, never did exist, every person so offending shall," etc.

The record shows that upon the trial, the prisoner's counsel, among other things, prayed the court to charge the jury, that if they were satisfied the note offered in evidence was a false note of a bank, company, or association, actually existing in the State of Illinois, they should acquit, whether such bank or company was chartered by the laws of that state or not. This instruction was refused by the court, but they charged the jury, that if they found the note one of an existing company, known to the prisoner as not legally chartered by the laws of Illinois, they should convict. In giving this charge, the court below were in error. The offense is the uttering of such note, knowing it to be of a non-existing bank or company, and not the uttering a note knowing it to have been issued by an existing unincorporated bank. Upon this ground the sentence is reversed, and the case remanded to the county for a new trial.

ROSWELL B. MEEKER *v.* THE STATE.

ERROR to the common pleas of Lorain.

This case raised precisely the same question as the last, and the same decision was had.

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*HARNESS RENNICK AND THE HEIRS OF RICHARD SEYMOUR [539
v. CADWALLADER WALLACE.

On a sale of land for taxes, under the statute of 1822, the purchaser under the judgment obtains all the owner's title, whether legal or equitable.

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RESERVED in the county of Pickaway.

This is a case in chancery, and the facts are as follows:

On August 3, 1787, Benjamin Holmes caused entry No. 513 of 1,000 acres of land in the Virginia military district, and within what is now the county of Pickaway, to be made on a military land warrant. On November 23, 1795, this entry was surveyed, and recorded in 1796. Previous to March, 1810, 200 acres of this survey was withdrawn, and has been located elsewhere. In March, 1810, the residue of the entry was surveyed and recorded, amounting to 800 acres. This land from 1815 to 1823 was taxed in the name of Thomas Carneal, present proprietor; Benjamin Holmes, original proprietor. It was described as 800 acres; entry No. 513; original quantity 1,000 acres. The taxes all being in arrear, at the December term of the court of common pleas of Pickaway county, 1824, a judgment was rendered for the amount of these taxes, under the law of "providing for the remission of penalties, and for the sale of land for taxes," passed January 30, 1822. In pursuance of this judgment, the land was sold to Richard Seymour, who sold a part of it to William Rennick, who sold the same to Harness Rennick. The sale to Seymour was confirmed by the court, and an order made upon the auditor to execute a deed, which was done accordingly. Possession was taken by the complainants, and has been retained ever since.

In April, 1831, Wallace, the defendant, professing to act for and by authority of the heirs of Holmes, attempted to withdraw this entry, and immediately made a location in part on the same ground, and has procured a patent to be issued to himself as the assignee of Holmes' heirs. Said patent includes about 600 acres of the land claimed by the complainants as being covered by their deed from the auditor, pursuant to the judgment for taxes. The bill charges that Wallace, at the time he made his location and procured his patent, had full knowledge of their possession and interests. He admits that he had knowledge of their possession, and that they pretended to have some claim, but denies any definite knowledge of the extent of that claim.

Wallace having procured his patent, commenced an action of ejectment against the complainants, and recovered a judgment at 540] *law. The object of the bill is to enjoin this judgment, and to compel Wallace to release to complainants his interest in the land.

OLDS and LEONARD, for complainant.

SWAN, for defendant.

Judge HITCHCOCK delivered the opinion of the court:

This case was once before the court in a different shape, and the court then intimated an opinion that although these complainants could not defend at law, yet that in a proper case made, they might have relief in chancery. Lessee of Wallace *v.* Seymour and Rennick, 7 Ohio, 156. It may seem to be somewhat novel that a purchaser at a sale for taxes can acquire a right which can be enforced in equity, although he is defeated at law. But such a principle was recognized in the case cited, and it grew out of the peculiar phraseology of our statutes upon the subject. And it was expressly held, in that case, where lands have been entered and surveyed in the military district and sold for taxes before patented, that when patented, "the patentee must hold the land subject to *any claim*" which a purchaser at tax sale may have in consequence of such sale. This is upon the supposition that the sale for taxes is legal, although in truth if the sale be not legal, a purchaser at such sale acquires no rights whatever; at least he acquires none to the land itself, neither legal nor equitable, although if he goes into possession and makes improvements, he may, under the law for the relief of occupying claimants of land, recover compensation for the improvements made. If the court were right in the decision of the case cited, it would seem that the only inquiry in this case must be, whether the sale for taxes under which the complainants claim, was in conformity with law. No exceptions are taken to it, except such as grew out of circumstances which transpired previous to the judgment, such as the informality in listing, etc. The quantity of land is listed as 800 acres, original entry 1,000, and which part of the 1,000 acres is intended is not described. And it is supposed that this comes within the case of Lafferty, Lessee, *v.* Byers, 5 Ohio, 458. In answer to this objection, it is proper to remark that the sale in the case last cited, was under an entirely different statute from the one under which the sale in the present *case was made. That was a sale for the taxes [541 direct; this was a sale under a judgment for the taxes.

The act of January 30, 1822, entitled "an act providing for the remission of penalties and for the sale of land for taxes," 2 Chase's Ohio L. 1216, under which the judgment was recovered on which this land was sold, in section 19 provides, that the deed to be executed by the auditor "shall convey to the purchaser all the title, *either in law or equity*, which the owner had in the lands

described in the said deed, at any time after the taxes, interest, and penalties, or either, for which the same was sold, began to accrue; and shall be received in all courts in this state and elsewhere as *primâ facie* evidence of good title to the land therein mentioned; nor shall the title conveyed by such deed be invalidated or affected by the reversal of such judgment, or any error therein, or by any error in the proceedings previous to the rendition of any such judgment relating to the charging or collecting of taxes on such land or the obtaining of any such judgment." This law must be disregarded, or this exception on account of the error in listing, if there was any error, must be disregarded. In carrying this law into effect we can not go behind the judgment to examine into the legality of previous proceedings.

Another exception taken to this tax sale is, that the judgment is for taxes in the name of Carneal and not of Holmes. This, however, can make no difference. The proceedings are rather *in rem* than *in personam*. The taxes were a lien upon the land, and the object of the law was to subject the lands to sale. Besides, although upon the duplicate the lands were entered in the name of Carneal, yet the fact appeared, in the same duplicate, that Holmes was the original proprietor; and this fact, too, must have appeared in the advertisement giving notice of the sale; so that not only Carneal, but Holmes, or the heirs of Holmes, had notice that the taxes had not been paid, and, unless paid, that the land would be sold.

From anything appearing to the court, the proceedings after judgment were correct and the sale legal. The deed, made in pursuance of this sale, conveyed to the complainants, in the words of the statute, "all the title, either in law or equity," of the former owner of the land. That title, at the time, was an equitable title; but since that period, the defendant, knowing these facts, has, as 542] assignee of the former owners, acquired the *legal title. He can hold this title in no other character than as trustee for these complainants.

A decree will be entered enjoining the judgment in ejectment, and compelling Wallace to release.

ASA MAYO *v.* C. T. J. & WM. BLOSSOM.

Bill of review upon matters of fact.

BILL of review, reserved in Miami county.

The case was argued, at great length, upon the facts, by D. S. GROSVENOR and HOLT, for plaintiff; and R. S. HART, and B. F. POWERS, and CRANE and SCHENCK, for defendants.

LANE, J., delivered the opinion of the court:

The original suit has been heretofore decided in bank, at the term of 1834; and involving facts only, not principles, it was deemed inexpedient to report it. The plaintiff, whose bill was dismissed, has again subjected it to our examination. In its present form it affords an example of what Chancellor Kent once called the distressing voluminousness of papers. The *abstract* brief of the plaintiff is contained in 416 closely written folio pages, and the papers filed consist of more than a cubic foot. It would be wrong to complain of this preparation while new materials facilitate our examination of the case. The plaintiff seeks, by this bill, to settle the accounts of a partnership in manufacturing and merchandise. The right to the account is admitted, and the principal questions arising are, whether certain machinery, taken as part of the capital stock, was agreed to be received at the price of $14,000, or whether its value was left open, or whether fraud was practiced by the defendants, in inducing the plaintiff to admit it at that price.

In 1834, these questions were carefully examined by the then members of the court, and their decree made upon the basis of the agreed valuation of the machinery, no fraud being shown. The present members of the court have examined it again, and their opinion is unchanged. It is deemed unnecessary to repeat the proofs which have led to their conclusion upon the facts.

*Other questions are raised upon exceptions to the reports. [543 The matter has been twice referred to accountants of much skill and judgment, and the whole laboriously sifted by counsel. In the cases pointed out by the exceptions, we find no reason to believe the masters erred. The plaintiff was unfortunate either in a hard bargain or a losing business; but the very complicated

state which these accounts have assumed, render it unlikely that the results of any new examination will be more satisfactory or more just. Decree affirmed with costs.

ABRAHAM HICKOX *v.* CITY OF CLEVELAND.

Where the corporation of a town are authorized to grade and level streets, and provide a mode for assessing damages and compensating adjacent proprietors, an action can not be sustained against them for an act done in the legal execution of the duties prescribed.

TRESPASS on the case, reserved in Cuyahoga.

The case is submitted to the court upon an agreed state of facts, which are fully stated in the opinion of the court.

ANDREWS and FOOTE, for plaintiff.

H. B. PAYNE, for defendants.

Judge GRIMKE delivered the opinion of the court:

This action is brought for damage occasioned by grading Union lane and Water street, in the town of Cleveland. On June 15, 1834, an order was made by the corporation for grading certain streets, including the two above mentioned. The order was made in pursuance of a law passed February 18, 1834. Union lane was graded in pursuance of the order in the year 1834. Water street was graded during the summer and fall of 1835, under an order for continuing the first-mentioned grade, and this order was made April 15, 1835. On March 7, 1835, an act amendatory of the preceding act was passed by the legislature, appointing three persons therein named, to appraise the damage which might occur to any persons from the prosecution of the work. On September 5, 1835, a committee of three persons were appointed by the corporation, by virtue of section 4 of the last act, to appraise the damages caused by the grading. This committee was duly organized, and from about October 20, 1835, to February 26, 1836, met regularly 544] to receive *and determine claims for damages; at which last-mentioned time they made their returns to the corporation, having disposed of all claims before them, since which they have never convened.

It is admitted that the plaintiff had notice of the time and place when and where the committee met, and that he preferred a claim for the injury to his lot on Union lane, which was acted upon and disallowed by the committee. It is further admitted, that previous to January 1, 1836, the plaintiff had notice of an act of the legislature, passed in December, 1835, amendatory of the preceding act of March, 1835, and that he did not present any claim for damage to his property on Water street. It is also admitted that the board of appraisers consisted of three persons, two of whom were citizens, and all freeholders of Cleveland, and that they generally made their appraisement upon view of the premises, without examining witnesses or hearing parties, excepting that the statements of parties were heard upon request.

In what respect, then, does the case differ from that of Scovil v. Giddings, 7 Ohio, 211? In none, except that the present action is brought against the corporation, and in the former it was against an agent. But this in reality presents a difference of fact, and not of principle; the corporation acted under the authority of an act of the legislature, and no action will lie for what they have done in the execution of that duty, unless they exceeded the authority confided to them, or abused that authority by acting arbitrarily or oppressively in the mode of carrying it into execution.

In Boulton v. Crowther, 2 B. & C. 703, where, by a general turnpike act, the trustees of roads were authorized to divert, shorten, or improve them, it was held that no action could be maintained against them for a consequential injury, resulting from an act which they were authorized to do. And this was only a ratification of the same principles which had been previously declared in Sutton v. Clarke, 6 Taunt. 34. There the defendants had a public trust to perform, and it was held that having acted *bona fide*, and according to their best skill and diligence, in the exercise of a public function, although they had done an act which occasioned consequential injury to a citizen, they were not liable for such damage. The case of Leader v. Moxton, 3 Wils. 461, has been sometimes supposed to be inconsistent with these determinations.

In Manufacturing Company v. Moredith, 4 D. & E. 790, Lord Kenyon says that he doubts the accuracy of the report of that case in Wilson. But in reality, that case is not at *all irre- [545
concilable with any one of the subsequent determinations. It would seem from the report that the defendants had been guilty

of an abuse of the authority intrusted to them; they were, therefore, trespassers *ab initio*. The question, therefore, was rightfully determined, although the court may have been mistaken in the annunciation of the general principle. The case which I have just referred to, from 4 D. & E., is itself a decisive authority against the present action.

The principle declared in these cases has been strengthened and confirmed by subsequent decisions in this country. In Steele *v.* Navigation Company, 2 Johns. 286, the action, as in this instance, was directly against the corporation, but inasmuch as they acted under the authority of an act of the legislature, it was held that no action was maintainable against them. And in Callender *v.* Marsh, 1 Pick. 418, where a surveyor was authorized by statute to dig down a street, it was decided that if he acted within the scope of his authority, a party injured could not institute an action against him, nor against any other person employed by him.

The power complained of, in this instance, is one which has been exercised in every civilized country. At Rome, the general care of the highways was given to the Ædiles, who appointed agents for the superintendence of the roads without, and of the streets within, the city. And one of the duties of these last was to level the streets. Where private property was taken for public uses, the civil law allowed a compensation. The common law lawyers have always contended against this right. In this country we have adopted the former rule, the State of South Carolina being the only one which I recollect whose constitution does not guarantee the right to be compensated in such cases. Whether this case, however, comes within the provision of our constitution, I think may well be doubted. Private property is not in reality appropriated to public uses; but by leveling the streets in Cleveland, a consequential injury only is sustained by individuals. It was in the power of the legislature, however, to award compensation; and they have made effectual provision for that purpose. The act of February 18, 1834, gives the authority to grade Union and Water streets, and that of March 7, 1835, provides for the assessment of damages.

What just ground of complaint is there then? It is that the right to jury trial is not preserved. There is not a single state in the Union, in which a case of this kind has been supposed to fall
546] *within the constitutional provision relating to trial by

jury. From time immemorial, the practice of assessing damages, by commissioners variously appointed, has been in use in the United States. And yet notwithstanding so many of them have revised and changed their constitutions, it has never been thought necessary to make the guarantee of jury trial more comprehensive in its meaning than it was before supposed to be. There is a total inapplicability of the use of jury trial in such a case. It may as well be said that a tax can not be collected without convening a jury, in the case of every individual, to determine whether it is rightfully levied. If it should not be, then an action would be maintainable; and so in this case, if the corporation had exceeded the authority intrusted to them, they would subject themselves to an action, and then, in both instances, jury trial would have its full application. 7 Ohio, 111.

It is evident, then, that this action can not be supported. Water street was graded in the summer and fall of 1835. The committee to assess were in session until February, 1836, and yet the plaintiff presented no claim for damages, probably because he did not approve the decision of the committee on his claim for damages on Union lane. The amendatory act of December 17, 1835, declares that those who shall omit to present their claims shall be deemed to have waived them; in that mode, and as against the present defendants, there never existed a right of action.

Judgment for the defendant.

ABIGAIL STANBERY *v.* JAMES MITTEN.

On an appeal from the common pleas to the Supreme Court, there is no power to discharge the security in the appeal bond, that he may be used as a witness.

MOTION to change bail, on appeal from Richland.

This suit came into the Supreme Court by appeal from the common pleas, bond, with security for the appeal, having been filed according to law. The appellant being desirous of availing himself of the testimony of the security in the appeal bond, moved for his discharge and for the substitution of other security, in order that the original security might be a witness for him. The

question on the motion was reserved, the court on the circuit to settle the practice.

No argument was submitted on either side.

547] *Judge Wood delivered the opinion of the court:

No decision upon the subject is recollected by the court, and none are cited; and our decision aims merely to settle a question of practice, of frequent recurrence, the way the practice is settled being of very little consequence.

In the statute of 1831 (29 Ohio L. 179), sec. 52, it is provided that when the surety in recognizance shall be insufficient, *or his testimony shall be required by the appellant*, in "appeals from justices of the peace, it shall be lawful for the court of common pleas, on motion, to order a renewal of such recognizance, and direct that the same be certified to the justice from whose judgment the appeal was taken, or to have it recorded in the common pleas." This provision is limited in its application to appeals from justices of the peace to the common pleas. There is no similar provision applicable to cases brought by appeal from the common pleas into this court, and we think the plain inference is, that the legislature, in the latter class of cases, or the general assembly, did not intend to confer the like power upon this court.

Section 109 of the practice act, 29 Ohio L. 109, provides that the bond required to perfect an appeal from that court shall be approved by its clerk. It is his duty to judge of the sufficiency of the bond and of the security. This is a ministerial act of his, and this court has in the way no control over it. When the appeal bond is approved by the clerk and filed, the rights of the appellant and the obligations of the appellee are fixed, and a majority of this court are of opinion such rights are beyond the power of this court, upon a mere question of expediency or convenience. A party should reflect upon the effect of his steps before he takes them, and not the court to permit him to retrace them. This court is careful not to interfere with the exercise of such duties, so clearly vested in the clerk and the party, in order to substitute its own discretion. 5 Ohio, 276; Wright's S. C. 741.

It is said, however, that the law has been modified in this respect, by section 4 of the act of 1834, in force when this motion was made. 33 Ohio L. 55. We do not think this case within the scope of that act. Its language does not embrace the case. That

section was designed merely to limit the time of excepting to appeal bonds, defective in form or otherwise, and provided that the omission to except beyond the time specified should be held a waiver of the right to object. The bond before *us is [548 properly executed, and is made in due time and form. Had the general assembly intended to confer on this court power to permit a change of the appeal bond, it would have done so expressly; as its exercise is not essential to the fair administration of justice, the court is disinclined to take it by implication. The motion is overruled.

AUSTIN WEBB v. VANDEVEER B. MOLER.

The franchises of a corporation can not be forfeited except by judicial sentence, nor can real estate conveyed to it be lost to its object by non-user.

ERROR to the common pleas of Montgomery.

The suit below was for trespass upon land, part of the southeast quarter of section 17, township 2, range 6, lying in Dayton township. The defendants pleaded the general issue (which was joined), with a notice, that before suit Richard Stephens was seized in fee and possessed of a part of said quarter section (describing the metes and bounds), and conveyed the same by deed to Charles Morgan, Jacob Darst, Luke T. Dorsey, George Patterson, and William Hatfield, trustees of the Columbian school of Dayton, and their successors in office, under which said trustees were seized and possessed; and that afterward, said Darst, with A. and D. John and A. Hosier, then trustees of said school, bargained and sold said land to Webb, the defendant, put him into possession thereof, and entered into a written contract with him, signed by said A. John, as president, and said Darst, Hosier, and D. John, as trustees of said school, to convey the same to him, when he paid the purchase; that he entered under said agreement and exercised acts of ownership as it was lawful for him, and such acts are the supposed trespass complained of.

The case upon said pleadings was tried by a jury, and there was a verdict and judgment for the plaintiff, Moler. In the prog-

ress of the trial, a bill of exceptions was tendered and sealed in substance as follows:

That Moler, having given evidence of his possession of the premises described in the declaration, and a deed from Stephens and wife of December 1, 1819, conveying the land in fee to Morgan and others and their successors in office, trustees of the Columbian school, *to the only use and benefit of said school*, agreeably to their constitution, forever; and, having further 549] *given in evidence a deed from the same Stephens and wife, dated April 23, 1836, which, reciting the deed made by them "many years since" to said Columbian school, for school purposes, and nothing else; that said corporation had long ceased to exist as a corporate body, and the premises to be occupied for school purposes, by which the premises had reverted to them, therefore, they conveyed the same to Moler forever, for the consideration of three dollars; and having also read in evidence the articles of association of said Columbian school, which, among other things, designated the object of the association to be, to secure to themselves, and their heirs, such property as might be donated to them for *literary purposes* and the *good government* of their school; established the corporation government of a president and trustees to be annually elected, and that "the president and two of the trustees shall form a quorum, do all business pertaining to the association, *hold all property*, real and personal, to the only use and benefit of the association, *and dispose of the same when three-fourths of the members of the association shall deem it expedient;*" and to apply the property and fund *wholly to literary uses;* and the said Webb having, in defense, given in evidence a title bond made by the trustees of said Columbian school, dated May 2, 1836, reciting, that for the consideration of the receipt of an obligation for $50, they bound themselves to make him a good and sufficient deed for the same, so soon as he or his assigns paid said $50; and proven, that at the sale of the premises at public auction, about April 29, 1836, they put Webb into possession. The evidence closed, whereupon the defendant, Webb, prayed the court to instruct and charge the jury as follows:

That "if they were satisfied that said corporation of the Columbian school had a valid and legal right to the premises in question, and that in April, 1836, the trustees of said corporation put said defendant, Webb, into possession of the premises, it was

immaterial whether he was put into possession under a sale made by said corporation, or its trustees, or not; or whether that sale was a valid one or not; and that if he was so put into possession by said trustees, it operated as a license to the defendant to enter and occupy." And said defendant further moved the court to instruct the jury, "that no non-user by said corporation of the Columbian school under which the defendant, Webb, claimed to hold the premises in question, of any of its *corporate [550 rights, or any of its corporate property, will operate a forfeiture of any such rights or property, unless such default or forfeiture shall be first judicially determined in a legal proceeding, instituted for that purpose, according to law"—which said instruction the court refused to give; but as to the last question of law so prayed to be given in charge to the jury, the court instructed them, "that no non-user by said corporation of its corporate franchises would operate as a forfeiture of such franchises, unless such default and forfeiture had first been judicially determined in a legal proceeding instituted for that purpose; but that the *corporate property* of said corporation might and would be forfeited by the non-user thereof, amounting to an abandonment by said corporation, without such forfeiture being first judicially ascertained in a legal proceeding instituted for that purpose; and that said plaintiff might avail himself of such forfeiture, to sustain his legal title to the premises in question, derived by said conveyance from said Richard Stephens and wife by the deed, dated April 23, 1836, admitted in evidence." And on the matter of law, on which the defendant, Webb, first prayed the court to instruct and charge the jury, the court instructed and charged, "that the defendant could not avail himself of any matter of license or authority from said corporation, or its trustees to enter or occupy the premises in question under the pleadings as made up in this cause, if the said corporation had abandoned and forfeited their right and title to the premises." Webb excepted to said charges and refusal, and assigns them as error, on which he claims to reverse the judgment.

H. STODDARD, for plaintiff in error:

1. The first deed from Stephens divested him of all title, and the subsequent deed to Moler conveyed no title.

2. The license pleaded should not have been ruled out; the evidence showed a conveyance from the trustees of the school,

who held the fee; they contracted with him for all their title, and put him into possession. This license was a good defense. 3 Ohio, 89, 93.

3. The true principle is, that so long as the corporation exists, neither its corporate franchises, nor its property held in its corporate character, is divested by any *mal*, or *nonfeasance*. A for-
551] feiture must first be judicially determined. 3 Burr. *1866, 1871; 2 Term, 515; 3 Term, 199, 244; 5 Johns. Ch. 366, 376-380; 2 Kent, 289-291, 278, 304-306, 312, 313; Ang. on Corp. 510, 511; 2 Chase's Ohio L. 1918; 4 Com., tit. Fr. G. 5, F. 10; 10 Coke, 30.

ODLIN and SCHENCK, contra.

Insisted that the deed from Stephens to the corporation, for special objects, was conditional, and created only an estate in the corporation liable to be defeated, by non-user or misuser, in violation of the terms of the grant. The oral proof established the perversion of the property from the uses of the grant, and the reversion to the grantor was a legal consequence, and the next step at the trial was to make title to the party under the reversioner himself. Such reversion, resulting from matter *in pais*, could only be proved by oral testimony. The uses of the grant are sufficiently expressed in the deed; but if they were not, its legal effect should be judged of in reference to the act incorporating the grantees, which declares that "no part of the property to be owned by such association, shall at any time be applied to any other purpose than the establishment and support of a school or a library, as the case may be." The grantees could not abandon the estate, nor desecrate the house for literary purposes, nor sell it, without violating the grant.

Corporations have a determinable fee only for the purposes of enjoyment. 2 Kent's Com. 282.

2. The question is only one of inquiry into the title of real estate, not blended with corporate franchises. If a grant be made to the Dayton Bank, to be used only for banking purposes, and the bank should convert the property into a hotel or livery stable in violation of the condition of the grant, that would work a forfeiture of the estate, although the bank with all its franchises would still continue to exist. The common pleas, therefore, drew a proper distinction between corporate franchises and corporate property We admit that the corporate franchises can only be forfeited by the judgment of a competent court to that end. But surely as to

property, a corporation, like a natural person, may forfeit or occasion its reversion, and still remain in *esse*. The very license relied upon by Webb, was itself a forfeiture of the estate.

*A. HARLAN, in reply: [552

Cited 9 Cranch, 51; 6 Cowen, 23; 1 Hall, N. Y. 191; 2 Term, 515.

Judge LANE delivered the opinion of the court:

No proposition is more thoroughly established, than that the franchises of a corporation can not be forfeited without a judgment either on *scire facias* or *quo warranto*. Abundant authorities are cited to this effect in the argument.

The court of common pleas seem to have considered, that although corporate franchises can not be divested without a judicial sentence, corporate property might be lost by non-user alone. No such distinction is known in law. The capacity to hold land in one franchise. The grant of land to a corporation is called, by Blackstone, "an estate for life, which may endure forever, or which reverts to the donor only when the life of the donee is terminated." 1 Black. Com. 484.

Among the multitude of authorities bearing on this point, it is enough to refer to two from New York: 6 Cowen, 23; 1 Hall, 97. The doctrine these authorities declare is, "that proceedings of trustees of a corporation, *de facto*, are valid until ousted by a judgment in a proper suit, and that no advantage can be taken of any non-user, on the part of a corporation, by any defendant in a collateral action."

The trust of a charity is not lost by the trustees' neglect of duty. If it can not be carried into execution, the land may revert to the donor. But where it can be enforced, a court of chancery will furnish all needful relief.

Judgment reversed.

JOHN ARMSTRONG *v.* THE HEIRS OF WILLIAM HUSTON.

Where an appraiser of lands to be sold by an administrator becomes a purchaser, the sale may be set aside on application of the heir, as infected with fraud.

THIS is a bill filed in the county of Mercer, to review a decree in the Supreme Court, rendered in 1837, and reserved for decision in bank.

The original bill, filed by the heirs of Huston, sets forth that he died seized of land, parts of which were sold in the due course of administration. That the administrator preferred a supple 553] mentary *petition, showing further sales necessary; that the court appointed appraisers, of whom John Armstrong was one, to assign dower and value the lands. Upon the return of the commissioners' report, the court confirmed the assignment of dower, and directed a sale of so much of the land as will produce the sum of $500. Sales were made under this order to the extent of $621, which were confirmed by the court, and conveyances duly made. John Armstrong was one of the purchasers. The plaintiffs, who were minors at the time of this sale to Armstrong, claim relief against it, upon the following ground:

1. That more land was sold than was authorized by the order.

2. That Armstrong assumed to buy for the benefit of the family.

3. That being an appraiser, his purchase may be set aside by them.

At the term of the common pleas to which the report of the sale to Armstrong was made, it was found necessary to sell the remainder of the lands. The estate, on its final settlement, proved insolvent.

This suit came on for hearing at the Supreme Court for Mercer county, in 1837, and a decree was made setting aside the sale to Armstrong, on the plaintiff's repayment of the sum advanced, and interest. This decree is complained of as erroneous, and this bill is brought to review it.

THOMAS and HALL, for plaintiffs.

CRANE, for defendant.

Opinion of the court, by Judge LANE:

The present case presents the single question, whether the appraiser of land at an administrator's sale stands in such a relation that his purchase, without fraud, will be set aside at the instance of the heirs; for the question respecting the quantity to be sold, is to be made only before the court granting the order and confirmation. 10 Pet. 450; 6 Ohio, 269; 7 Ohio, pt. 1, p. 262. There

seems no reason to distrust the integrity of Armstrong, or the fairness of the sale. The appraisal is not shown to be too low, when made, although the land has since appreciated. The sale was at public vendue, and no proof is made that Armstrong assumed to purchase for the benefit of the family.

The statute of 1824 (2 Chase's L. 1300, sec. 12), forbidding purchasers by appraisers, relates to sales by execution only. The disability of the appraiser in the present case, if it exists, arises *under those general principles of equity, which prevents [554 those from acquiring a title, to whose discretion or agency the management of a sale is confided.

The application of this doctrine to trustees, executors, attorneys, and agents is familiar in all the books. A majority of the court unite in the opinion, that the principle of exclusion attaches to every person, to whose integrity and judgment is committed the execution of any step needful in making the sale.

Where the law creates fiduciary relations, it seeks to prevent the abuse of confidence, by insuring the disinterestedness of its agents. It holds the relations of judge and party, of buyer and seller, to be entirely inconsistent. The temptation to abuse power for selfish purposes is so great that nothing less than that incapacity is effectual, and thus a disqualification is wrought by the mere necessity of the case. Fullness of price, absence of fraud, and fairness of purchase are not sufficient to countervail this rule of policy. To give it effect, it is necessary to recognize a right in the former owner, to set the sale aside in all cases on repayment of the money advanced. 2 Johns. Ch. Cas. 252, and cases cited; 1 Story's Eq. 315, *et seq.*

The appraiser of land is interposed between the buyer and seller in judicial sales, to prevent sacrifices, at undue prices, to the detriment of those interested in its value. If he were permitted to profit by his position, the law would lose its strongest security for his integrity. The legislature has acted in view of this, by imposing on him a disability by statute to purchase at sales under execution; but in this it only adopted a well-established rule of policy applicable to all analogous cases.

Bill of review dismissed.

Dissenting opinion of Judge HITCHCOCK:

The principal question in this case is, whether a purchase at

administrator's sale, made by one who had assisted in appraising the property, shall be set aside on the petition of heirs of creditors, when the sale was properly conducted and has been approved by the court of common pleas.

There is no controversy as to the general doctrine, in equity, that a trustee can not purchase the trust property of his *cestui que trust*, and this doctrine applies to agents, executors, administrators, sheriffs, and other ministerial officers intrusted with the sale of property, auctioneers, etc., and, in general, to all cases where one party has it in his power, in consequence of confidence re-
555] posed, *in a secret manner to sacrifice interests for his own advantage, which he is bound to protect. Does an appraiser of land, under our law regulating the duties of administrators, etc., come within this rule? It seems to me not, but my brethren think otherwise.

By this law, if, in the progress of the settlement of an estate, it becomes necessary to sell lands for the payment of debts, application is made to the court of common pleas by petition by the administrator, and the heirs are made defendants. If the court are satisfied that a sale is necessary, the next step taken is to appoint three freeholders of the county to appraise the land intended to be sold. These appraisers, after taking an oath to act faithfully, fix a valuation upon the land, and make return to the court, and their duty is performed. They have no further agency in the business, no further power over the land. The only trust and confidence reposed in them is to fix this valuation. It is a trust, if trust it may be called, which might, by *possibility*, be abused if reposed in one individual, but it is reposed in three; and I have a better opinion of that class of freeholders who are ordinarily selected by the court as appraisers, than to suppose they would violate their oaths, because one of their number might desire to become the purchaser of the lands which they were about to appraise.

The court, having ascertained the value of the land, direct the administrator to sell, and the law provides that, in the first instance, the land shall not be sold for less than two-thirds of the appraised value. After the sale, the business again comes before the court, and if, upon examination, everything is found to be fair and legal, the administrator is ordered to make a deed. It would seem as if here were guards and checks sufficient in the statute it-

self, without going beyond it to devise others from the doctrine applicable to trusts.

It is the policy of the law, and for the interest of all concerned, that competition should be encouraged at administrators' sales, as well as at all other sales made in pursuance of judicial proceedings. Upon this principle, by a late act of the general assembly, an administrator is allowed, under certain restrictions, to be a purchaser at his own sale. 35 Ohio L. 60. But by the decisions of the court, three men are precluded from bidding, because if they have no right to purchase, they have no right to bid. Although one of them may be willing to give more, much more, than any other individual, yet he can not have the land. And the *land itself must be sold for less than its value, because he [556 who is willing to give for it its value, has been once appointed by the court to ascertain that value. I can not see this to be proper, and it seems to me that an appraiser possesses nothing of that fiduciary character contemplated in the doctrine precluding trustees from purchasing. Judge Benson says, "Although it may seem hard that the trustee should be the *only person* of all mankind who may not purchase, yet for very obvious consequences it is proper the rule should be strictly pursued, and not in the least relaxed." 2 Caine's Cases in Error, 183. By the decision in this case, however, the trustee is not the "only person" who may not purchase.

No case has been cited as directly in point, and it is by analogy the principle is to be sustained. The case most analagous to the one before the court is the case of the New York Building Company *v.* Mackenzie, 8 Bro. P. C. All I know of this case is derived from what is said by Chancellor Kent in the case of Davoue *v.* Fanning, 2 Johns. Ch. 252. From his statement it seems that the case originated in the court of sessions in Scotland. "The appellants were an insolvent company, and their estates were sold by order of the court of sessions at a public judicial sale to satisfy creditors. The course of such sale is to set up the property at a value fixed upon by the court, which is called the *asset price*, and which is founded on the information procured by the common agent of the court, who has the management of all the outdoor business of a cause. The respondent here was the common agent in that case, and he has purchased himself at the asset price, no person appearing to bid more, and the sale was affirmed by the

court." This order of confirmation was reversed in the house of lords, and the sale set aside. The reasons, it seems, are not given in the reported case, and can only be gathered from the arguments of counsel.

It may, at first view, be thought that this is a strong case in favor of the position that appraisers have no right to purchase; but upon careful examination, I think it will be found that there is but little analogy between it and the case before this court. What was the business of this common agent? All I know about it is, as before remarked, from what is said by the chancellor in the case referred to. He had the management of all the out-door business of a cause. He ascertained for the court the value of the land, not from his own knowledge, but from the information of others. He afterward sold the land. If in this I am correct, he 557] *was more like an administrator, under our law, than like an appraiser, and having purchased the land, he stood before the court in the character of both vendor and vendee. In order that the analogy might be complete, the purchaser, in the case referred to, should have been one from whom the common agent received information as to the value of the land, not the common agent himself. "This decision," the chancellor says, "carried the doctrine to its full extent," but when we extend it to embrace an appraiser, we certainly extend it much further.

It is claimed on the part of the heirs, that by an equitable construction of section 12 of the act of February, 1824, "regulating judgments and executions," Chase's Ohio L. 1297, this case is embraced.

This thing of extending a statute by equitable construction is a matter of which our people, for whom statutes are made, know but little. And there certainly is not that general character in the legislation of the state which renders it necessary to extend statutes by equitable construction. If even necessary, the cases are extremely rare.

Section 12 of the act regulating judgments and executions has reference to sales of real property by a sheriff, and forbids that officer, or any person, who has, in pursuance of the law appraised the land, to purchase, and declares a purchase made by either void. There is certainly a similarity in the modes of proceeding between sales by sheriffs and by administrators. In either case the land must be appraised, and in the first instance can not be

sold for less than two-thirds its appraised value. But there is this difference; the sheriff sells immediately upon the appraisal without the interference of the court, while an administrator can not sell until the appraisal itself is approved and a sale subsequently ordered. Whether this difference is so material that in the one case the sale should be declared void, and in the other held good, is not for me to say.

One reason for extending a statute by equitable construction is, that if the case to which it is proposed to extend it had been in the mind of the legislature at the time the statute was enacted, it would probably have been embraced. This case was in the mind of our legislature when the statute regulating judgments and executions was passed. That act was passed on the 4th of February, and the act defining the duties of administrators, etc., on the 11th, only seven days after. Both acts must have been necessarily before that body at one and the same time. Under *these circumstances, I can come to no other conclusion [558 than that, as the legislature prohibited an appraiser from purchasing in one case, and did not in the other, in the case where not prohibited, it was intended he should have an equal right with others to purchase.

There is another view of this subject which is worthy of consideration. Lands of deceased persons have been sold substantially in the same manner they are now for the payment of debts, since 1807, a period of more than thirty years. Is it not possible that within that time there are many instances in which appraisers have been purchasers? There has been no positive law against it. It is possible that even among the members of the legal profession, the prevalent opinion has been that such purchase was proper. I must confess that I never heard a doubt suggested with respect to it until this case was presented to the court on the last circuit. Under such circumstances, even if I suspected the practice might be wrong, I would not interfere. The legislature are the appropriate tribunal to apply the remedy. They might do it as they have done in the case of sheriff sales, by a law which would be prospective in its operations, while the decisions of this court has upon these titles all the effect of retrospective legislation. I know it may be said that this court has nothing to do but to declare the law, regardless of consequences; but there is

another maxim. It is this: *Communis error facit jus*, and it is peculiarly applicable to a case like the present.

There is another question in this case. The estate of Huston was insolvent, as appears from the facts of the case. We all agree that, under such circumstances, the rights of the heirs are subordinate to the rights of creditors. Under such circumstances if the purchase by Armstrong is set aside, a resale should be ordered, and the proceeds applied, first, to refund the amount advanced by Armstrong, and then in payment of debts. But such was not the decree in this case. Such could not be the decree, because neither the administrator of Huston, nor his creditors, are parties upon the record. The effect of the decree is to vest in the heirs of Huston property which confessedly does not belong to them until the debts of their ancestors are paid. It seems to me that, in this respect, it is wrong, and for this reason, as well as for the reasons before assigned, should be reversed.

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2. An assignment of property, in trust for the benefit of creditors, can not be set aside under the statute of 1835, on the mere ground of a preference of creditors, if there is nothing in the terms of the assignment, or in other facts proved, to show that it is infected with fraud. The Hulls *v.* Jeffrey et al. 390.

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6. If in such case, the purchaser has occupied the land, and the payment already made does not exceed fair rent, the vendor need not refund it. Ib. 201.
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11. A ward can sustain a bill in equity in Ohio, for an account against the personal representative of his guardian, who was appointed in Philadelphia, received assets of his ward, and died in Ohio without settlement. Pedan *v.* Robb, 227.
12. A decree to marshal descended lands for the payment of debts can only be made, when the demand is made in the pleadings, so as to present a case for proof at the hearing. Matoon *v.* Cole et al. 250.
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3. If an agent with power to sell, in executing a contract, recite in the body thereof his agency, and describe himself as acting under a power to sell, it is not necessary that he should add his superscription. Wheeler *v.* Knaggs, 170.
4. A power of attorney may subject the principal to the action both of the attorney and the party contracting with him. Ib. 170.
5. When an attorney, with power to sell, having a contingent interest in a contract with a purchaser, makes with him a separate agreement with reference to it, he does not become in consequence joint contractor with the purchaser, in relation to the principal. Ib. 171.
6. A power of attorney coupled with interest, can not be revoked after a contract is made for its execution. Ib. 172.
7. It is no answer to an action by an attorney against his principal on a collateral agreement, that a private understanding between the parties had been broken by the attorney. Ib. 173.
8. In a contract, that an agent shall sell land for a stated sum or retain all over that sum to his own use, the rule of damages between agent and principal is the said surplus; and in such case, action accrues on the refusal of principal to ratify, though long credit be given for the excess Ib. 173.
9. If a purchaser of land delays payment of the principal part of the purchase money long after it is due, he can not compel in equity specific performance of the contract. Higby *v.* Whittaker, 201.
10. If, in such case, the purchaser has occupied the land, the vendor need not refund the money already paid, if equitably due as rent. Ib. 201.
11. Intoxication to incapacitate a party to a contract, will cause it to be annulled in chancery. French *v.* French, 214.
12. A contract by a bank for a greater rate of interest than that limited in its charter, is void. Bank of Chillicothe *v.* Swayne et al. 280.
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6. The corporation of a town, authorized to grade and level streets, assess damages and compensate proprietors, are not liable to an action for an act done in the legal prosecution of their business. Hickox *v.* City of Cleveland, 543.
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1. A deed executed by a *feme covert*, in conjunction with her husband's attorney in fact, is valid and binds her. Glenn *v.* The United States Bank, 79.
2. In ejectment, a party may set up title under a lost deed, which has never been recorded; but the execution and loss must be proved to the satisfaction of the court, before secondary evidence as to the contents can be admitted. Blackburn's Lessee *v.* Blackburn, 82.
3. The validity of a deed is not affected by entries, which are not part of the original papers, but made by the recorder on the margin of the registry. Foster's Lessee *v.* Dugan's Ex'rs, 107.
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5. In a sheriff's deed, it is sufficient to recite so much of the proceedings as shows clear authority for its execution. Ib. 135.
6. The use of a wife's separate property by her husband is a good consideration for a deed from him to her. Lessee of Hill *v.* West et al. 223.
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2. In assignment of dower, the value at the time of the assignment must be taken as the rule; but all increased value from actual improvements on the lands must be excluded. Ib. 465.

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1. In ejectment, a party may set up title under a lost deed, which has never been recorded; but the execution and loss must be proved to the satisfaction of the court before secondary evidence as to the contents can be admitted. Lessee of Blackburn v. Blackburn, 82.
2. Where an objection is first taken in bank, that the plaintiff in ejectment can not recover, because he has laid his demise of three lessors and his proofs show the entire title in one, the cause shall be remanded to the circuit, with leave to amend upon payment of costs. Lessee of Buckley et al. v. W. Osburn, 182.

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3. In an action for use and occupation against tenants under a void lease, the lease is evidence to prove the value of the rents. Wilson v. No. 16, 180.
4. In a bill to render an equitable interest in lands liable on a security in a bond, a judgment against the surety is *prima facie* evidence that the bond was made and its condition broken. Matoon v. Cole et. al. 249.

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5. The admission of an administrator is *prima facie* evidence of the indebtedness of the estate he represents. Ib. 250.
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3. A general judgment against a decedent can not be revived against his heirs, unless it can be shown that there is no personal representative and that the heir has received assets by descent. Douglass *v.* Waddle, 210.
4. A bill for an account may be sustained between executors and administrators of different estates. Stiver *v.* Stiver, 220.
5. An executor or administrator is accountable for everything he receives in which decedent had interest. Ib. 220.
6. A ward may sustain a bill in equity in Ohio, for an account against a personal representative of his guardian, who was appointed in Philadelphia, received assets of his ward and died in Ohio, without settlement. Pedan *v.* Robb, 227.
7. The admission of an administrator is *prima facie* evidence of the indebtedness of the estate he represents. Matoon *v.* Cole et al. 250.
8. A judgment in favor of an administrator defendant, under the statute of limitations of Massachusetts, is no bar to a bill in equity in Ohio, to subject after discovered property of decedent to the payment of the debt. Ib. 250.

FEME COVERT—

1. If a *feme covert* execute a deed, in conjunction with her husband's attorney in fact, she is bound by it. Glenn *v.* United States Bank, 79.
2. The use of a wife's separate property by her husband, is a good consideration for a deed by him to her. Lessee of Hill *v.* West et al. 223.
4. A deed by a *feme covert*, and her husband, with covenants of warranty, estops her setting up an after-acquired title. Ib. 225.
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4. The estate of a bastard who survives his mother, and who dies without issue, and intestate, does not descend to the maternal line. Lessee of Little et al. v. Lake, 289.
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2. A discharge under the insolvent laws of New York, in order to be valid, must be made by an officer having the degree of counselor at law. Bank of Utica *v.* Card, 521.

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Where there is a special understanding between the insurer and the insured, that no insurance should be considered as effected till the payment of the premium, no agreement to insure is binding in equity till this condition is either performed or dispensed with. Flint *v.* Ohio Insurance Co. 504.

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4. In a bill to render an equitable interest in lands liable on a security in a bond, a judgment against the surety is *prima facie* evidence that the bond was made and its condition broken. Mattoon *v.* Cole et al. 249.
5. A judgment in favor of an administrator defendant, under the statute of limitations of Massachusetts, is no bar to a bill in equity in Ohio to subject after-discovered property of the decedent to the payment of the debt. Matoon *v.* Cole et al. 250.

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1. The equitable interest of grantor in land conveyed by way of mortgage, with separate covenant by grantee to reconvey, can not be taken in execution at law. Baird et al. *v.* Kirtland, Fowler, et al. 22.

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7. Wild and uncultivated lands are and always have been subject to dower in Ohio. Allen *v.* McCoy, 464.
8. Lands located as early as 1787, in the name of an assignee and the original owner setting up no claim till 1814 when he assigned the warrant to one who afterward located it in 1823, an original assignment may be presumed by the jury in absence of all explanation. Lessee of McArthur's Heirs *v.* Gallaher, 515.
9. Lands sold under a judgment for taxes, the purchaser obtains all the owner's title, whether legal or equitable. Rennick and Seymour's Heirs *v.* Wallace, 540.
10. Lands sold by an administrator, and purchased in by one who had been an appraiser thereof, the sale may set aside by the heir as infected with fraud. Armstrong *v.* Huston's Heirs, 553.

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3. A judgment in favor of an administrator defendant, under the Massachusetts statute of limitations, is no bar to a bill in equity in Ohio, to subject after-discovered property of the decedent in payment of the debts. Matoon *v.* Cole et al. 250.
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2. When the mortgagee purchases the mortgaged premises, under judgment the mortgagor, after judgment is reversed, is entitled to his right of redemption. Hubbell *v.* The Heirs of Broadwell, 127.

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On the question of sufficiency of notice to the indorser of a promissory note, all the facts which are of the *res gestæ* may be given in evidence, though no one alone is sufficient to prove the fact of notice. Remington *v.* Harrington, 509.

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1. Suits by *quasi* corporations must be brought in the corporate name. Wilson *v.* No. 16, 179.

2. It is too late to allege a change of parties in the transcript and declaration, after a general plea to the action. Ib. 179.

3. In a petition for dower, out of an estate conveyed by the husband in separate parcels during coverture, it is not necessary that all the separate holders should be made parties defendants, but a separate petition may be preferred against each. Allen *v.* McCoy, 463.

4. In a bill to set aside a conveyance in trust on the ground of fraud, a decree will bind the interests of all, though the *cestuis que trust* be not made parties. Campbell *v.* Watson et al. 500.

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The holder of a bill of exchange on a person in Ohio, payable in New York, is not entitled to six per cent. damages on protest for non-payment. Farmers' Bank of Canton v. Brainerd et al. 292.

RECORD—

1. Marginal notes, not part of the original papers, which are made by the recorder on the registry, do not affect the validity of a deed. Doe, Lessee of Foster et al. v. Ex'rs of Dugan, 107.
2. Upon a writ of error, the court will disregard a bill of exceptions, if not made part of the record. Acheson v. Western Reserve Bank, 119.

RELEASE—

A release from a prior to a subsequent mortgagee only extinguishes the first mortgage. Lessee of Hill v. West et al. 224.

REPLICATION—

See CHANCERY.

ROADS—

Chancery will not interfere with corporations for the construction of roads and canals, in questions of location within proper points; nor upon application of one complaining of the transit of the actual location through his land. Walker v. Mad River and Lake Erie Railroad Company, 39.

SCIRE FACIAS—

Under *scire facias* mortgage law, a mortgagee may proceed against the premises of the mortgagor decedent, even though the personal representative of the mortgagee be made sole defendant. Biggerstaff et al. v. Loveland et al. 44.

SECURITIES—

1. Where blank signatures are obtained on false pretenses, to be afterward filed up for money, and are delivered in payment of a precedent debt, and are afterward filled up as notes by the creditor's agent, the securities are not bound. Riley and Van Amringe v. Johnson et al. 528.
2. On appeal from the common pleas to Supreme Court, there is no power to discharge the security on the appeal bond that he may be used as a witness. Stanbery v. Mitten, 547.

SHERIFF—

Titles conveyed by sheriff as commissioner under order of the court to make deed of partition, are not affected by irregularities in the proceedings. Doe, Lessee of Foster et al. v. Ex'rs of Dugan, 106.

SHERIFF—*Continued.*

In a sheriff's deed, it is sufficient to recite so much of the proceedings as shows an undoubted authority for its execution. Lessee of Armstrong v. McCoy, 135

SLAVERY—

An indictment for secreting a slave must aver that the accused knew the harbored person to be a slave. Birney v. The State, 237.

SPECIAL ACT—

Under a special act of the legislature for taking an account upon a public contract, a bill in chancery may be filed, and a decree rendered against the state for the amount found due. Hampson v. The State, 315.

SURVEY—

A corner set, in a survey, under the United States law, may be corrected by the lines of subdivision, subsequently made (filed notes of which are deposited in the proper office), and the boundary be established accordingly. Lessees of Reed v. Marsh, 158.

TAXES—

1. Lands of a decedent may be sold so pay taxes accumulating upon them which the decedent's personal representative has no power to pay. Welsh et al. v. Perkins et al. 54.
2. Under the law of 1827, a sale of land for taxes before 1820, is good, although a portion of the taxes accruing between 1820 and the time of sale are not included; no subsequent sale for the omitted taxes can be legally made. Lessee of Buckley et al. v. Osburn, 182.
3. The residence of a professor of a literary institution, erected on its lands, is not exempt from taxation. Kendrick v. Farquhar, 196.
4. The county auditor's certificate of a sale of land for taxes descends from the holder to his heir. Rice v. White, 216.
5. A state law may treat steamboats as a part of the property of the state that is subject to taxation. The Berrys v. Torrence, 522.
6. On a sale of land for taxes under the statute of 1822, the purchaser under the judgment takes all the owner's title, whether legal or equitable. Rennick and Seymour's Heirs v. Wallace, 540.

TRESPASS—

An action for trespass by disseizee against disseizor may be barred by the statute of limitations, and can not be maintained for wrongs done, while disseizor is out of possession. Rowland v. Rowland, 41.

TRUST—

A purchaser of legal title of lands, knowing it to be a trust for a decedent, takes it subject to the trust. Stiver v. Stiver, 221.

VENDOR AND VENDEE—

1. Where a vendor, having title, refuses or puts it beyond his power to convey, the rule of compensation, in equity, is, the value when the contract ought to have been performed. If the contract be to deliver the

VENDOR AND VENDEE—*Continued.*

deed and pay the money at the same time, and the vendee make no actual tender, he can not have costs. Dustin *v.* Newcomer, 50.

2. A contract to convey land, on August 1, 1835, or as soon as vendee shall pay two thousand dollars, fixes August 1, 1835, for its ultimate execution; and a subsequent tender of the conveyance will not entitle the vendor to an action for the purchase money. Felter *v.* Weybright et al. 168.

VIDELICET—

An averment in a declaration laid under the usual *videlicet*, that demand of payment was made on a day before or after the expiration of the days of grace, is good after verdict. Peabody *v.* Fisher, 536.

WILL—

1. Will must be established by probate in the common pleas before it can be received as evidence of any title set up under it. Lessee of Swazey's Heirs *v.* Blackman, 18.
2. The statute of Ohio forbids the revocation of a written and duly executed will by a nuncupative one. McCune *v.* House and Litch, 144.
3. A devise of lands in Ohio, executed in a sister state according to her laws, is sufficient, if duly recorded with the authentication of its probate in the county where the lands lie. Bailey *v.* Bailey et al. 240.
4. The words "I devise my lands" in a will, are sufficient to pass an estate of inheritance. Smith et al. *v.* Berry et al. 367.

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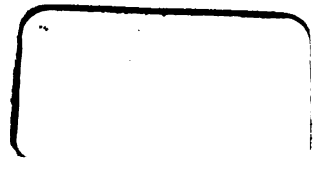
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